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No. _____

In the Supreme Court of the United States

THE CITY OF SAN ANTONIO,

Petitioner,

v.

ENCORE VIDEOS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SCOTT D. BERGTHOLD
LAW OFFICE OF
SCOTT D. BERGTHOLD, P.L.L.C.
6830 MCCUTCHEON ROAD
CHATTANOOGA, TN 37421
(423) 899-3025
(425) 899-3029 FAX

MICHAEL P. HODGE
DEPUTY CITY ATTORNEY
Counsel of Record
DONALD S. BAYNE
ASSISTANT CITY ATTORNEY
P.O. BOX 839966
SAN ANTONIO, TX 78283
(210) 207-8766
(210) 207-4357 FAX

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QUESTION PRESENTED

This Petition involves a challenge by Encore Videos, Inc. to San Antonio Ordinance No. 87443, which governs the location of sexually oriented businesses, including adult bookstores. Such enterprises are permitted to locate as of right in numerous zoning districts throughout San Antonio, provided that they remain 1,000 feet from other sexually oriented businesses, residential districts, and properties devoted to schools, religious worship, and public parks.

The Question Presented is:

Did the Fifth Circuit err as a matter of law in holding that the City's sexually oriented business zoning ordinance violates the First Amendment because, although the City adduced evidence demonstrating the negative secondary effects of such businesses – including adult bookstores – the city was also required to produce evidence that differentiates between subcategories of adult bookstores and specifically addresses those without viewing booths?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below are completely set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The City of San Antonio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is published at 330 F.3d 288. Pet. App. 1a-19a. The Fifth Circuit's Order denying rehearing is included at the outset of the published opinion. Pet. App. 2a. The district court's opinion and orders, Pet. App. 20a-64a, are unpublished.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The appendix, at 65a-91a, reproduces the First Amendment to the United States Constitution and San Antonio Ordinance No. 87443.

STATEMENT OF JURISDICTION

The Fifth Circuit denied petitioner's timely petition for rehearing on April 29, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the important and recurring question of whether cities, when regulating the location of sexually oriented businesses, satisfy the burden of defending their legislative judgments by relying on evidence which demonstrates the negative secondary effects of that category of businesses. The Fifth Circuit held that San Antonio's

reliance on numerous studies demonstrating the adverse impacts of sexually oriented businesses, including adult bookstores, was constitutionally insufficient because the City's evidence did not differentiate between *subcategories* of adult bookstores and specifically address those without viewing booths. Pet. App. 12a-13a.

At least three courts of appeals have reached the opposite conclusion and do not require cities to produce studies specifically addressing the various modes of delivery of sexually oriented materials at adult bookstores. *Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998) (upholding state regulations of adult bookstore without peep show booths).

This Petition presents the Court with an ideal vehicle to finally decide the issue. Although another panel of the Fifth Circuit had previously upheld the City's predecessor ordinance against a First Amendment challenge, Pet. App. 32a-34a, the panel below held that the First Amendment requires a tighter means-end fit to justify the zoning of respondent's subcategory of sexually oriented businesses. This Court should grant certiorari because the Fifth Circuit's heightened requirement of specificity in secondary effects evidence conflicts with decisions of the Sixth, Eighth, and Tenth Circuits, as well as with the previous decisions of this Court. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (holding that cities may rely upon any evidence "reasonably believed to be relevant"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000) (same); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion) (same); *see also id.* at 451 (Kennedy, J., concurring in judgment) (same).

* * * *

On April 27, 1995, the San Antonio City Council passed Ordinance No. 82135 to regulate the locations in which sexually oriented businesses may operate in the City. The ordinance prohibited such businesses from operating within 1,000 feet of each other or within 1,000 feet of residential areas, places of worship, schools, and public parks. Pet. App. 24a. In adopting Ordinance No. 82135, the City "considered land use studies from no less than fifteen cities and considered decisions from the United States Supreme Court in drafting its ordinance." Pet. App. 44a, n. 7.

At its original location, Encore's business met the distance requirements set forth in Ordinance No. 82135 and was issued a certificate of occupancy without an expiration date because it was a conforming use. Pet. App. 24a. Sometime in 1996, however, Encore lost its lease and moved to its current location, which is within 1,000 feet of a residential area. Pet. App. 24a. Encore was eventually given a citation for operating without a certificate of occupancy and later filed the instant suit pursuant to 28 U.S.C. § 1331. Pet. App. 24a-25a. Although Encore never obtained a certificate of occupancy, it remains open pursuant to an agreed preliminary injunction issued by the district court on September 18, 1997. Pet. App. 25a.

In February 1998, the City amended Ordinance No. 82135 by passing Ordinance No. 87443, which retained the location requirements for sexually oriented businesses, but changed Ordinance No. 82135 by (1) requiring the building department to approve or deny a certificate of occupancy request within 30 business days of receiving one, and (2) clarifying the definition of adult bookstore by specifying that having more than 20% of inventory devoted to sexually graphic materials

would qualify a business as an adult bookstore. Pet. App. 34a-35a.

The preamble to Ordinance No. 87443 "confirms that Ordinance 87443 amends Ordinance 82135 passed and approved April 27, 1995, and re-enacts said ordinance by regulating the locations available for sexually oriented businesses." Pet. App. 34a, n.4. The preamble to the current ordinance also confirms that the City relied on numerous secondary effects studies, including reports from Garden Grove, California, Seattle, Washington, and five Texas cities: Austin, Houston, Dallas, Beaumont, and Amarillo. Pet. App. 34a, n.4.

While this action was proceeding in the district court, the Fifth Circuit Court of Appeals issued an unpublished opinion in *NATCO, Inc. v. City of San Antonio*, No. 98-50645 (5th Cir. June 2, 1999), which upheld Ordinance No. 82135 as constitutional. Pet. App. 33a-34a. Specifically, the Fifth Circuit stated that the preamble to Ordinance No. 82135 "explains with great detail and specificity the secondary effects that the ordinance was designed to address." Pet. App. 33a. "Moreover, the record evidence shows that the City relied on studies provided by the City Council relating to secondary effects, and that it obtained legal advice before passing the ordinance. Accordingly, we find that the City has justified Ordinance #82135 as fulfilling a substantial government interest." Pet. App. 34a.

When the City filed its motion for summary judgment in the district court, it attached the *NATCO* decision in support of its motion. Pet. App. 32a-34a. After discussing the City's extensive legislative findings and secondary effects record, the district followed *NATCO* and ruled that the City's ordinance is narrowly tailored to serve the City's substantial interests,

such as preventing adverse impacts on nearby property values. Pet. App. 47a-48a.

The Fifth Circuit reversed in an opinion reported at 310 F.3d 812. On petitions for rehearing, however, the panel denied the petitions but withdrew its initial opinion and replaced it with a second, which is reported at 330 F.3d 288.

In the second opinion, the court noted that in *NATCO* another panel of the Fifth Circuit had found that "the city 'relied on studies provided by the City Council relating to secondary effects.'" Pet. App. 4a (quoting *NATCO, Inc. v. City of San Antonio*, No. 98-50645, slip op. at 6 (5th Cir. June 2, 1999) (unpublished)). The court below found that the *NATCO* court's *factual* findings on this point were persuasive authority and stated that it would "follow them here." Pet. App. 4a.

Analyzing the City's zoning requirement as a time, place, and manner regulation, the court first determined that it is content-neutral because of the City's secondary effects record and because "the record discloses *zero* proof of improper motive...." Pet. App. 7a (emphasis in original).

Turning to the substantial government interest prong of the analysis, the panel did not mention the Fifth Circuit's previous holding in *NATCO*, but did conclude that "the secondary effects the San Antonio ordinance seeks to remedy are important enough to be considered a substantial government interest under the time, place, and manner test." Pet. App. 8a. The panel went on to state that it had previously interpreted the substantial government interest standard as requiring proof that the ordinance "is *effective* in serving that interest." Pet. App. 8a. The panel noted that this requirement "arguably conflicts with *City of Renton*,

which mandates only that a statute be '*designed* to serve a substantial government interest' and does not require evidence of effectiveness." Pet. App. 8a (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)).

The panel concluded, however, that it need not evaluate the effectiveness of the City's ordinance under the substantial government interest prong, because "[e]vidence of effectiveness" which fails to meet that prong will also fail what the panel called "the *much more stringent narrow tailoring* prong." Pet. App. 9a (emphasis supplied).

Looking at the ordinance's definitions, the court opined that the City defines sexually oriented businesses "broadly," Pet. App. 10a, despite the fact that the ordinance defines "adult bookstore" as an establishment where more than 20% of the inventory or floor space must consist of materials "characterized by an emphasis on the description or depiction of specified anatomical areas or specified sexual activities" or "non-contraceptive instruments, devices, toys, or paraphernalia designed for use in connection with specified sexual activities...." Pet. App. 70a-71a.[1]

The panel expressed objection, however, because the definition of adult bookstore includes businesses without video viewing rooms – that is, "businesses at which individuals can buy or rent sexually explicit materials for at-home viewing." Pet. App. 11a. The panel surmised that the regulation "might" be used to target non-sexual businesses, but cited no evidence – in the record or elsewhere – for such a

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[1] The ordinance, in turn, defines "specified anatomical areas" to include explicit nudity and defines "specified sexual activities" to include various sexual acts.

proposition. *But cf. Malloy v. City of Lewisville*, 848 S.W.2d 380, 383 (Ct. App. Tex. 1993) ("In the absence of evidence that the main-line chain bookstores in question had at least 20% of their 'stock and trade' devoted to sexually oriented material... or that they were dealing in sexually related instruments, devices, or paraphernalia, the appellants have failed to show that those stores fell within the application of the ordinance.") Nevertheless, the panel concluded that the City's secondary effects evidence was insufficient to support "the city's extensive regulation of sexually oriented businesses." Pet. App. 12a.

Though noting that the City's evidence of harmful secondary effects included adult bookstores, the panel concluded that the failure of those studies to "differentiate the data" between subcategories of adult bookstores (i.e., those that have rooms for showing videos and those that do not) rendered them ineffectual. Pet. App. 12a.

The panel then offered the following explanation for its holding: "Off-site businesses differ from on-site ones, because it is only *reasonable* to *assume* that the former are *less likely* to create harmful secondary effects." Pet. App. 12a (emphasis supplied). The court, addressing only one of several harmful secondary effects targeted by the City's zoning ordinance, assumed: "If consumers of pornography cannot view the materials at the sexually oriented establishment, they are *less likely* to linger in the area and engage in public alcohol consumption and other undesirable activities."[2] Pet. App. 12a (emphasis added).

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[2] The panel's assertion that patrons "cannot view" sexually explicit images at adult bookstores without viewing booths is both unsupported by the record and wrong as a matter of common sense

The panel then opined that under the narrow tailoring requirement, the City was required to provide specific evidence about "establishments that sell adult products solely for off-site entertainment." Pet. App. 13a. This requirement, however, is directly contrary to the repeated holding of this Court that cities may rely upon any evidence reasonably believed to be relevant to the problem they are addressing. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (city entitled to draw reasonable inference from secondary effects data *even when that legislative data is not directly on point* with the types of businesses the city's ordinance regulates).

Nevertheless, because the City did not provide such specific evidence about Encore's *kind* of adult bookstore, the panel held that it "must strike down the zoning provisions of Ordinance #87443." Pet. App. 13a.

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because although an establishment may not have booths for viewing sexually graphic movies, hundreds – if not thousands – of sexually explicit images are regularly displayed in magazines and on video box covers in adult bookstores. Indeed, it would appear that the primary means by which patrons make rental and purchasing decisions of various types of pornography and sex toys is by choosing among the multitude of sexually explicit images on display within the store. Thus, the distinction that the lower court assumed was determinative (e.g., where sexually explicit images are viewed – "on-site" versus "off-site") is properly understood as a distinction in the medium (either print or celluloid) through which sexually graphic images are disseminated within an adult bookstore. Of course, this distinction is irrelevant to a number of secondary effects targeted by adult use zoning, such as decreased property values around clusters of sexually oriented businesses.

REASONS FOR GRANTING THE WRIT

The grounds for granting certiorari to review the Fifth Circuit's judgment in this case are straightforward.

I. The Decision of the Fifth Circuit Court of Appeals Conflicts with the Decisions of Other Circuits and of This Court.

San Antonio's zoning ordinance, if passed in one of the seventeen states that comprise the Eighth, Tenth, and Sixth Circuits, would have been deemed constitutional under those courts' existing precedents. *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994); *Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998).

Additionally, federal district courts in the Fourth and Ninth Circuits have recently upheld zoning regulations for sexually oriented bookstores without peep show booths in the face of challenges similar to that presented below. *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County*, 256 F.Supp.2d 385, *27 (D. Md. 2003) (holding that zoning ordinance which regulates adult bookstores without booths, "meets the relatively easy burden of narrow tailoring"); *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F. Supp. 2d 1143 (E.D. Wash. 2002) (noting that "the Supreme Court's decision in *Alameda Books* is consistent with the Tenth Circuit's decision in *Z.J. Gifts* and the Eighth Circuit's decision in *ILQ Investments*").

There is no logical way to reconcile the split of authority between the Fifth Circuit and the other circuits. By holding that San Antonio's extensive secondary effects evidence is not

sufficiently specific to respondent's style of adult bookstore, the Fifth Circuit has greatly limited the ability of cities to properly zone sexually oriented enterprises to prevent red light districts, protect residential areas, and preserve commercial property values. The lower court's strict standard directly contravenes the holdings of this Court and the three circuits which permit local legislatures to rely upon secondary effects data concerning adult bookstores to regulate sexually oriented retail stores as a category of adult uses.

II. The Fifth Circuit Erred as a Matter of Law.

The Fifth Circuit erred as a matter of law in requiring the City to adduce not only evidence discussing the adverse impacts of sexually oriented businesses, including adult bookstores, but also evidence that "differentiate[s] the data," Pet. App. 12a, between different kinds of sexually oriented businesses. This "heightened specificity" requirement for *legislative* evidence is foreign to this Court's cases governing review of cities' adult business zoning ordinances.

In addressing the negative secondary effects of sex-related enterprises, cities may rely upon *any* evidence "reasonably believed to be relevant" to its goal of preventing secondary effects. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion); *see also id.* at 451 (Kennedy, J., concurring in judgment). This broad standard includes evidence from a wide range of sources, including the experiences of other communities, *Renton*, *supra* at 51-52, and previous judicial opinions. *Id.* at 50-51 (upholding reliance on previous state supreme court decision); *City of Erie*, *supra* at 297 (noting that under *Renton* "reliance on a judicial opinion that describes the evidentiary basis is

sufficient"). Specifically, this Court's precedents allow cities to rely upon secondary effects attributable to one type of erotic business when regulating other types of establishments within the general category of sexually oriented businesses: "Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *City of Erie*, *supra* at 297.

When a city makes legislative findings regarding secondary effects, the Court will accept the "state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Id.* This is because the planning commission and city council, familiar with local needs, "can make particularized, expert judgments" concerning the prevention of secondary effects. *Id.* at 298. Precise "empirical proof" is not required for legislative judgments, *Alameda Books*, *supra* at 439 (plurality opinion), and courts should refrain from second-guessing the assessments of city planners. *Id.* at 451 (Kennedy, J., concurring). Rather, municipalities are entitled to make reasonable inferences from the legislative data, *id.* at 452, and must be given a "reasonable opportunity to experiment with solutions" to the secondary effects of sexually oriented enterprises. *Id.* at 439 (plurality opinion) (quoting *Renton*, *supra* at 52 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion))).

The Fifth Circuit's holding violates each of the foregoing rules.

As an initial matter, the City clearly relied upon evidence "reasonably believed to be relevant" to the secondary effects of sexually oriented businesses. The City's legislative record

is more extensive than any of those reviewed by the Court in *Young*, *Renton*, *Erie*, *Alameda Books*, or *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding regulation despite lack of *any* legislative record). San Antonio's record included studies demonstrating the adverse effects of not only the general category of sexually oriented businesses, but also the specific category of adult bookstores. Pet. App. 11a; *see also Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 n.1 (10th Cir. 1998) (discussing Garden Grove, Austin, and Amarillo studies – all of which San Antonio considered – and their conclusions linking secondary effects to adult bookstores). Although the studies may or may not address respondent's *subcategory* of adult bookstore – it is unclear because the studies do not "differentiate the data" within the category – they nevertheless track businesses specializing in either materials or performances "characterized by an emphasis on" explicit sex acts and nudity.[3] Pet. App. 70a-71a. It is was thus reasonable for the city council to make a legislative finding that the category of sexually oriented businesses known as "adult bookstores" (which includes Encore's kind of adult bookstore) would likely cause secondary effects if left unregulated by the zoning ordinance. Indeed, this Court has permitted greater inferences to be drawn by allowing cities to treat inanimate erotica – from a secondary effects standpoint – as being "of the same character" as live erotica, notwithstanding the difference in the medium used to present the sexually explicit images. *City of Erie*, *supra* at 297 (holding that nude dancing regulations

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[3] Ordinance No. 87443's definition of adult bookstore also includes 'non-contraceptive instruments, devices, toys, or paraphernalia designed for use in connection with specified sexual activities..." The inclusion of such devices, which are obviously not found in garden-variety bookstores, also demonstrates that the ordinance is narrowly focused on sexually oriented establishments.

justified by reliance on previous judicial decisions dealing with adult theatres).

Here, the City Council made detailed legislative findings for both the current Ordinance and its predecessor, and explicitly relied upon the experiences of other cities, including five cities in Texas. Pet. App. 34a. When the Ordinance was challenged, the City relied not only on the *NATCO* court's upholding of the predecessor ordinance as constitutional, but also upon the Eighth and Tenth Circuit decisions upholding similar zoning regulations against identical challenges. Rather than giving deference to the city's judgment about the relevance of secondary effects studies and prior judicial opinions, the panel refused to allow the city to draw *any* inferences, let alone "make particularized, expert judgments," *City of Erie*, 529 U.S. at 298, about the current existence or future threat of secondary effects.

Instead, the court required highly specific empirical proof and struck down the City's Ordinance for not having it. This was error. *Alameda Books*, *supra* at 439 (plurality opinion) (rejecting empirical proof requirement); *Erie*, *supra* at 299 (rejecting dissent's requirement that cities must "develop a specific evidentiary record supporting its ordinance.") In doing so, the panel improperly substituted its judgment for that of the legislative body and foreclosed the City from "experiment[ing] with solutions to admittedly serious problems" which warrant minimal zoning requirements for adult businesses. *Alameda Books*, *supra* at 439 (plurality opinion) (following *Renton* and *Young*).

Nor is the substitution of judgment which occurred below any less erroneous because it comes under what the court mischaracterized as "the much more stringent narrow tailoring prong." Pet. App. 9a; *cf. Bigg Wolf Discount Video*

Movie Sales, Inc. v. Montgomery County, 256 F.Supp.2d 385, *27 (D. Md. 2003) (upholding similar ordinance under the "relatively easy burden of narrow tailoring."). This Court's cases establish that a time, place, and manner regulation is constitutional so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The City's zoning ordinance regulates only businesses that specialize in erotic material and devices and is therefore "narrowly tailored" to affect only that category of businesses associated with secondary effects. *Renton*, 475 U.S. at 52. The validity of the City's land-use planning decision should "'not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (quoting *Albertini*, *supra* at 689).

Although the panel recognized that this Court's precedents reject a tight means-end fit for time, place, and manner regulations, *Ward*, *supra* at 799 (rejecting least-restrictive means analysis), it nevertheless invalidated the City's zoning regulation for lack of "substantial evidence of secondary effects specific to" respondent's subcategory of adult bookstores. Pet. App. 13a. And while the panel articulated an *assumption* about what might cause one of several possible secondary effects, Pet. App. 12a, it did so in the complete absence of *any* evidence that a substantial number of the ordinance's applications would fail to serve the City's legitimate goals. *But cf. Ward*, *supra* at 800 (holding that a regulation is constitutional "so long as the means chosen are not *substantially* broader" than necessary to further the government interest); *see also Albertini*, *supra* at 689 (holding

that time, place, and manner regulations "must be evaluated in terms of their general effect.").

Additionally, the panel's assumption, which limited the secondary effects doctrine to public alcohol consumption and the illicit activities of patrons, effectively nullified – without rebutting – the City's extensive legislative findings about the adverse impact of concentrations of sexually oriented enterprises on surrounding property values and family activities. Pet. App. 66a-70a (detailing, in 13 paragraphs, the City Council's legislative findings and the purpose underpinning the ordinance). These findings are fully supported by the Garden Grove study and reiterated in the Seattle and Austin studies. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 n.1 (10th Cir. 1998); *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County*, 256 F. Supp. 2d 385, *27 (E.D. Md. 2003) (discussing scope of Garden Grove's "adult bookstore" definition); *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F. Supp. 2d 1143, 1154 (E.D. Wash. 2002). Moreover, there is no record evidence to suggest that the secondary effect of decreased property values would be any different because a subcategory of adult bookstores does not have booths – indeed, nothing in the case even suggests that would-be purchasers of nearby property would inquire as to the specific nature of the adult bookstore(s) in the neighborhood.

The lower court's "heightened specificity" standard abrogates local decision-making and requires courts to reweigh legislative evidence *de novo*. "The level of detail in factfinding required by the [lower court] would be an improper burden for courts to impose on the [legislative body]. That amount of detail is as unreasonable in the legislative context as it is constitutionally unwarranted." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,

213 (1997); *see also City of Erie*, *supra* at 297-298 (explaining the extent of deference due to city council judgments). The panel's "more stringent" approach to the San Antonio sexually oriented business zoning ordinance contravenes the relevant precedents and constitutes a replacement of the panel's assumptions for the city council's legislative findings. The Fifth Circuit's stringent scrutiny is legal error which plainly violates not only the holdings of *Renton*, *Erie*, and *Alameda Books*, but also of "cases addressing regulations that strike closer to the core of First Amendment values." *Erie*, *supra* at 297 (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393-394 (2000)). The lower court's standard imposes an improper burden on city planners, is constitutionally unwarranted, and should be reversed.

III. The Question Presented is Important.

Twenty-seven years ago, this Court decided its first case concerning local land-use controls employed to prevent the "admittedly serious problems" caused by sexually oriented businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 71 (1976). In upholding Detroit's dispersal-type ordinance, the Court emphasized the "city's interest in planning and regulating the use of property for commercial purposes," *id.* at 62, and found that the city's interest in preserving "the quality of urban life is one that must be accorded high respect." *Id.* at 71. The city's planning interests were deemed particularly weighty in that case, where the city "silenced no message, has invoked no censorship, and has imposed no limitation" upon those who wish to access sexually explicit materials. *Id.* at 78 (Powell, J., concurring).

Similarly, in this case, there is no argument that the City of San Antonio has silenced any message or that it has failed

to regularly grant permits to adult businesses seeking to operate in conforming locations. Pet. App. 49a-51a. Rather, it has engaged in well-justified planning "to preserve the character of specific areas of a city," *id.* at 80, and its Ordinance reflects perhaps "the most essential function performed by local government." *Id.*

The Fifth Circuit's "heightened specificity" rule for secondary effects evidence goes far beyond the threshold requirement established in *Renton* and engenders the second-guessing of legislative judgments that this Court's precedents repeatedly eschew. The split in the circuits will continue to produce different results for various cities on this recurring issue of constitutional law. Because this case is an ideal vehicle to resolve the split and answer an important First Amendment question, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Michael P. Hodge
Deputy City Attorney
(Counsel of Record)
Donald S. Bayne
Assistant City Attorney
P.O. Box 839966
San Antonio, TX 78283
(210) 207-8766
(210) 207-4357 Fax

Scott D. Bergthold
Law Office of
Scott D. Bergthold, P.L.L.C.
6830 McCutcheon Road
Chattanooga, TN 37421
(423) 899-3025
(423) 899-3029 Fax

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-51119

[Filed April 29, 2003]

ENCORE VIDEOS, INC.)
Plaintiff - Appellant)
v.)
CITY OF SAN ANTONIO)
Defendant - Appellee.)
)

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR PANEL REHEARING

Appeal from the United States District Court
for the Western District of Texas
SA-97-CV-1139
Samuel Fred Biery, Jr, US District Judge

Before SMITH and EMILIO M. GARZA, Circuit Judges, and CUMMINGS,* District Judge.

*District Judge of the Northern District of Texas, sitting by designation.

PER CURIAM:

Petition for panel rehearing **DENIED**.

Encore Videos's petition for panel rehearing is DENIED. The City's petition for rehearing en banc is construed as a petition for panel rehearing pursuant to the 5th Cir. IOP to Fed. R. App. P. 35, and is also DENIED. The opinion of the court issued on October 29, 2002, 310 F.3d 812, is withdrawn, and the following is substituted:

I.

Appellant Encore Videos, Inc. ("Encore Videos"), operates a sexually oriented retail video store in San Antonio, Texas. In April 1995, the city council enacted Ordinance # 82135, which forbids sexually oriented businesses from locating within 1000 feet of residential areas. Encore Videos' store is within 1000 feet of a residential area, although separated by the Loop 410 highway. Encore Videos provides only sales for off-premises viewing; customers cannot view the videos at the store.

In September 1997, Encore Videos sued, challenging the ordinance on First Amendment grounds. In response, the city amended and reenacted the ordinance to impose procedural safeguards required by *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). The new law, Ordinance # 87443, took effect in March 1998. Encore Videos filed an amended complaint challenging the new ordinance on federal and Texas state constitutional grounds.

The district court granted the city's motion for summary judgment and denied Encore Videos'. *Encore Video [sic], Inc. v. City of San Antonio,* No. Civ. A. SA-97-CA1139FB, 2000 WL 33348240 (W.D. Tex. Oct. 2, 2000). Encore Videos appeals, arguing that the ordinance offends the *First Amendment* and the state Constitution. We reverse and remand.

II.

A.

Before addressing the merits of the First Amendment claim, we must determine whether the ordinance should be analyzed as a prior restraint--as advocated by Encore Videos--or as a time, place, and manner regulation. As a general rule, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority," is a presumptively unconstitutional "prior restraint." *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969). Zoning regulations restricting the location of adult entertainment businesses are considered time, place, and manner regulations, however, if they do not ban such businesses throughout the whole of a jurisdiction and are "designed to combat the undesirable secondary effects of such businesses" rather than to restrict the content of their speech *per se*."[1] Relevant harmful secondary effects of adult

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[1] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986); *see also Lakeland Lounge, Inc. v. City of Jackson,* 973 F.2d 1255, 1257-58 (5th Cir. 1992) (same).

businesses include crime, reduction of economic activity, and lowered property values. *Lakeland Lounge v. Jackson,* 973 F.2d 1255, 1257.

There is no evidence of improper censorial motives on the part of the city council. Where "nothing in the record . . . suggests impermissible motives on the part" of the enacting legislature, a local government seeking to use the secondary effects justification need show only that "(1) the drafters of the ordinance did rely upon studies of secondary effects," and (2) a "majority" of the city council members received "some information about the secondary effects." *Lakeland Lounge*, 973 F.2d at 1259.

In an opinion rejecting a *First Amendment* challenge to Ordinance # 82135, the predecessor to Ordinance # 87443, we held that the city "relied on studies provided by the City Council relating to secondary effects." *NATCO, Inc. v. City of San Antonio*, 182 F.3d 915 (5th Cir. 1999) (unpublished). In this circuit, unpublished opinions issued on or after January 1, 1996, generally are not binding precedent, although parties may cite them, and they have "persuasive value." 5th Cir. R. 47.5.4. *NATCO*'s factual findings on the exact point at issue surely carry "persuasive" weight. *Id.* They also have been endorsed by the district court *a quo*. In any event, there is no reason to go against the factual findings of *NATCO* on this point, and we follow them here.

Even a content-neutral regulation may be considered a prior restraint if it gives government officials "unbridled

discretion" to restrict protected speech.[2] But Ordinance # 87443 does not fall into this category, because the Director of Building Inspections may deny a sexually oriented business's permit application only if the applicant seeks to utilize a location within 1000 feet of a residential neighborhood, another sexually oriented business, or several other precisely specified types of properties. San Antonio Ordinance # 87443 § 2(a)-(f).

B.

1.

To pass constitutional muster, a time, place, and manner regulation must be "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Frisby v. Schultz,* 487 U.S. 474, 481, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (internal citations omitted). In *City of Renton*, 475 U.S. at 47, the Court stated that "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." The Court went on to say that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus

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[2] *See, e.g., Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1992) (invalidating regulation that "places unbridled discretion in the hands of a government official or agency"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975) (same).

avoiding the flaw that proved fatal to the regulations in [certain prior First Amendment cases]." *Id.* at 52. The Court thereby suggested that narrow tailoring is the test in this context.

Later Supreme Court decisions on time, place, and manner regulations have continued to apply the narrow tailoring standard.[3] A leading post-*City of Renton* secondary effects decision of this court also applied it. *See SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1273 (5th Cir. 1988).[4] We therefore conclude that the requirement of narrow tailoring remains in force.

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[3] *See, e.g.*, *Ward v. Rock Against Racism*, 491 U S. 781, 796, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Frisby*, 487 U.S. at 481; *cf. Int'l Eateries of Am., Inc. v. Broward County, Fla.*, 941 F.2d 1157, 1162 (11th Cir. 1991) (advancing several reasons why narrow tailoring requirement survives *City of Renton*).

[4] The more recent *Lakeland Lounge* decision, which also dealt with *First Amendment* challenges to a "secondary effects" ordinance, did not mention the narrow tailoring requirement, but neither did it explicitly repudiate it. *See Lakeland Lounge*, 973 F.2d at 1257 (holding that zoning ordinance restricting the location of adult businesses must be content-neutral, "'designed to serve a substantial governmental interest' and may 'not unreasonably limit alternative avenues of communication'") (quoting *City of Renton*, 475 U.S. at 47). Because *Lakeland Lounge* did not state that the standards it imposed were the *only* ones required, it is not directly inconsistent with SDJ or with post-*City of Renton* Supreme Court opinions applying the time, place, and manner test.

Encore Videos argues that the San Antonio ordinance fails to meet the first three of the four requirements of the time, place, and manner test. We address each in turn.

2.

The first requirement is content neutrality. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill v. Colorado*, 530 U.S. 703, 719, 147 L. Ed. 2d 597, 120 S. Ct. 2480 (2000) (quoting *Ward,* 491 U.S. at 791). Although Encore Videos claims that Ordinance # 87443 is "content-based," it provides no evidence to support that assertion.

The inquiry here is similar to that applied to the question of secondary effects motivation, described in part II.A, *supra*. It is not certain, however, whether the two tests require the same degree of proof of improper motive before a regulation fails them. Even so, an ordinance for which the record discloses *zero* proof of improper motive surely passes both tests.

3.

We next consider the requirement that the ordinance serve a substantial government interest. "A city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *City of Renton,* 475 U.S. at 50 (quoting *Young v. Am. Mini-Theatres*, 427 U.S. 50, 71, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976) (plurality opinion)). "Local governments . . . can restrict adult businesses in order

to control the bad 'secondary effects'--such as crime, deterioration of their retail trade, and a decrease in property values--that the establishments bring." *Lakeland Lounge*, 973 F.2d at 1257. There is, therefore, no doubt that the secondary effects the San Antonio ordinance seeks to remedy are important enough to be considered a substantial government interest under the time, place, and manner test.

We have interpreted the substantial government interest standard as requiring not only a showing of the *importance* of the interest, but also a demonstration that the challenged statute, at least to some degree, is *effective* in serving that interest.[5] This approach arguably conflicts with *City of Renton*, which mandates only that a statute be "*designed* to serve a substantial government interest" and does not require evidence of effectiveness. *City of Renton*, 475 U.S. at 47 (emphasis added). *City of Renton* does require proof of the *existence* of the secondary effects that the challenged ordinance seeks to eliminate but does not consider the question of proof of effectiveness in combating them. *Id.* at

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[5] *See J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998) (holding that "*Renton* teaches us that [to pass the substantial interest test] the government must produce *some* evidence of adverse secondary effects" that the ordinance works to eliminate); *see also Flanigan's Enter., Inc. v. Fulton County, Ga.*, 242 F.3d 976, 985 (11th Cir. 2001) (holding that "to meet their burden" under the substantial interest prong, "the Defendants must have some factual basis for the claim" that adult entertainment activities restricted by the challenged statute "result . . . in undesirable community conditions") (internal citations omitted), *cert. denied*, 536 U.S. 904, 122 S. Ct. 2356, 153 L. Ed. 2d 178 (2002).

50-52. This court's caselaw also may be in tension with other Supreme Court time, place, and manner cases that require evidence of effectiveness and necessity only as a part of the narrow tailoring prong of the time, place, and manner test. *See, e.g.*, *Frisby*, 487 U.S. at 484-87. Nonetheless, *J&B Entertainment* is binding on us unless overruled en banc.

Fortunately, this question has little practical significance for the present case. Evidence of effectiveness too weak to survive scrutiny under *J&B Entertainment*'s version of the substantial interest standard--which requires only that the "government must present sufficient evidence to demonstrate 'a link between the regulation and the asserted governmental interest' under a 'reasonable belief' standard"--surely will also fail to meet the requirements of the much more stringent narrow tailoring prong. *See J&B Entertainment*, 152 F.3d at 372. We therefore choose not to address any apparent inconsistency in the caselaw and, instead, will consider the relevance of the ordinance's effectiveness under the narrow tailoring prong.

4.

The ordinance's constitutionality under the time, place, and manner test therefore turns on the narrow tailoring prong. It fails to meet this test and therefore is unconstitutional.

A time, place, and manner regulation meets the narrow tailoring standard if it "targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby*, 487 U.S. at 485. Although government need not choose the "least intrusive means" to advance its legitimate interests, it "may not regulate expression in such a manner that a substantial

portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.[6]

Ordinance # 87443 prohibits sexually oriented businesses from being within 1000 feet of other sexually oriented businesses or residential areas, churches, schools, or parks. The ordinance defines "sexually oriented business" broadly. The regulation applies not only to establishments at which individuals can view sexually explicit materials on site, but also to establishments that do not permit on-site viewing (*i.e.*,

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[6] In *SDJ*, we said that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest." *SDJ*, 837 F.2d at 1276. *SDJ*, however, predates the Supreme Court's articulation of the narrow tailoring requirement in *Ward* and *Frisby*. *Ward*, 491 U.S. at 799; *Frisby*, 487 U.S. at 485. Although *Ward* and *Frisby* did not involve statutes regulating sexually oriented expression, we join our sister circuits in applying this more recent test in cases involving sexually oriented businesses. *See, e.g.*, *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1002 (7th Cir. 2002) (holding that restrictions on adult businesses "are narrowly tailored if they advance a substantial interest . . . and the restrictions do not 'burden substantially more speech than is necessary' for such for such advancement" (quoting *Ward*, 491 U.S. at 799)); *Lady J Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1365 (11th Cir. 1999) (holding that "narrow tailoring . . . prohibits regulations [of adult businesses] that are 'substantially broader than necessary'" (quoting *Ward*, 491 U.S. at 800); *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1221 (8th Cir. 1997) (adopting *Ward* test in an adult business case); *Phillips v. Borough of Keyport*, 107 F.3d 164, 174 (3d Cir. 1997) (holding that narrow tailoring in an adult business case requires that "'government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals'" (quoting *Ward*, 491 U.S. at 799)).

businesses at which individuals can buy or rent sexually explicit materials for at-home viewing). In addition, the ordinance applies to *any* bookstore, novelty store, or video store that devotes over 20% of its inventory or floor space to sexually explicit materials.[7] San Antonio Ordinance # 87443 § 1(2).

The city justifies this ordinance on the ground that it will reduce the adverse secondary effects (such as increased crime and the reduction of property values) of sexually oriented businesses. Therefore, in order to demonstrate that the ordinance is narrowly tailored, the city must show that the ordinance addresses these problems.

To establish that Ordinance # 87443 passes the narrow tailoring test, the city relies on three studies of the secondary effects of adult businesses, all conducted in other cities: one in Seattle, Washington, in 1989, another in Austin, Texas, in 1986, and the third in Garden Grove, California, in 1991. The city is "entitled to rely on the experiences . . . of other cities . . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city ad dresses." *City of Renton*, 475 U.S. at 51-52; *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002) (confirming that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest" (quoting *City of Renton*, 475 U.S. at 51-52)).

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[7] Thus, the ordinance might apply to many garden-variety book or music stores with restricted adult sections.

However, these studies do not support the city's extensive regulation of sexually oriented businesses. The studies either entirely exclude establishments that provide only take-home videos and books (as is the case with the Seattle study)[8] or include them but do not differentiate the data collected from such businesses from evidence collected from enterprises that provide on-site adult entertainment--as may have been the case with the Austin and Garden Grove studies.[9] Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects. If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities. *See World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18, 21 (Wash. 1991) ("[The city] has not shown that adult businesses with predominantly 'take-home' merchandise (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep

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[8] The Seattle study was limited to cabarets that provide live adult entertainment.

[9] Based on the evidence in the record, it is difficult to tell whether the Austin and Garden Grove studies excluded off-site entertainment businesses entirely or lumped them in with the rest. The Austin study covered two "adult book stores" and one "adult film store" among the six adult businesses studied, but failed to indicate whether these three businesses provide any on-site entertainment. The Garden Grove study focused on a total of seven adult businesses but neglected to indicate whether any of them provided exclusively off-site entertainment.

shows . . . ."). *But see Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998) (holding, without explaining why, that the on-site/off-site distinction is immaterial, because "the record fully supports the city's regulation of sexually oriented businesses providing both on- and off-site viewing of sexually explicit materials"); *ILQ Inv., Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994) (rejecting the distinction because "that simply is not the law," without giving more than a cursory explanation why).

Given the expansive reach of the ordinance in the instant case, we must require at least some substantial evidence of the secondary effects of establishments that sell adult products solely for off-site consumption. *See Alameda Books*, 525 U.S. at 438 ("The municipality's evidence must fairly support the municipality's rationale for its ordinance."). Otherwise, even ordinary bookstores and video stores with adult sections could be subjected to regulation that restricts their First Amendment rights without evidence that they cause "secondary effects."

In order to meet the narrow tailoring requirement, the city was required to provide at least some substantial evidence of secondary effects specific to adult businesses that sell books or videos solely for off-site entertainment. *See Ward*, 491 U.S. at 799 (holding that government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals"). Because there is no such evidence in the record, we must strike down the zoning provision of Ordinance # 87443.[10]

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[10] The Supreme Court's decision in *Alameda Books* is not to the contrary. In *Alameda Books*, the Court held that the evidence

III.

A.

Under *FW/PBS*, 493 U.S. at 227-28, a content-neutral "licensing scheme" for expression that "does not present the grave 'dangers of a censorship system'" must have two "essential" procedural "safeguards": "The licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied."[11] Like the present case, *FW/PBS* involved a zoning

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presented by Los Angeles to support its regulation of sexually oriented businesses was sufficient to survive summary judgment. The challenged provision in that case prohibited "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." 535 U.S. at 429 (quoting Los Angeles, Cal., Municipal Code § 12.70(C) (1983)). Los Angeles presented more compelling evidence to justify that provision than does the city in the instant case. Specifically, Los Angeles presented its own 1977 study that "concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities." *Id.* at 430. Clearly, that study, unlike the studies presented in this case, directly supported the specific regulation at issue in *Alameda Books*.

[11]Although the portion of Justice O'Connor's opinion for the Court laying out these standards won the support of only three Justices, three others endorsed a concurring opinion by Justice Brennan that argued for even stronger procedural protections. *FW/PBS*, 493 U.S. at 238-42 (Brennan, J., concurring). "When a fragmented Court

and licensing ordinance for adult businesses. *Id.* at 220-21. Encore Videos claims that Ordinance # 87443 violates both of the procedural requirements imposed by *FW/PBS*. Even though we decide in favor of Encore Videos on its challenge to the ordinance's zoning requirement, we must address the *FW/PBS* procedural issue, because Encore Videos will remain subject to Ordinance # 87443's procedural requirements even if one of the substantive elements is held to be unconstitutional.[12]

B.

We reject Encore Videos' argument that Ordinance # 87443 violates *FW/PBS*'s requirement that "the licensor must

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decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977). Thus, Justice O'Connor's opinion can be considered binding precedent.

[12] The relevance of *FW/PBS* is not affected by *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322, 151 L. Ed. 2d 783, 122 S. Ct. 775 (2002), which held that the procedural requirements of *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965), elaborated in *FW/PBS*, do not apply to "a licensing scheme . . . [that] is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." The present case does not concern "regulation of the use of a public forum." *Id.* Like *FW/PBS* and unlike *Thomas*--which addressed a demonstration permit system for public parks--this case addresses a licensing scheme for adult businesses. *Thomas* did not overrule *FW/PBS* or even hint that its scope has been narrowed.

make the decision whether to issue the license within a specified and reasonable time." *FW/PBS*, 493 U.S. at 228. The ordinance requires the Director of Building Inspections to "issue or deny a certificate of occupancy to a sexually oriented business not more than thirty (30) business days subsequent to the date of the application's submission of an application therefor." San Antonio Ordinance # 87443 § 2(f)(4). A license may not be approved until a series of inspections have been performed, and there is no time limit for the completion of the inspections.[13]

At first glance, the city's licensing system seems analogous to that which the Supreme Court found unconstitutional in *FW/PBS*. The ordinance challenged in that case also had a thirty-day deadline, combined with a system of required inspections for which there was no separate time limit. The ordinance was struck down because it "provided no means by which an applicant may ensure that the business is inspected within the 30 day time period." *FW/PBS*, 493 U.S. at 227.

The city and the district court here distinguish *FW/PBS*, however, on the ground that the permit system in question here assigns the task of inspection to the same official who is

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[13] *See* San Antonio Uniform Building Code § 109.3 (requiring that a "certificate of occupancy" be issued only "after the building official inspects the building or structure and finds no violation of the provisions of this code or other laws which are enforced by the code enforcement agency").

required to issue or deny a license within thirty days.[14] The Director of Building Inspections therefore is able to control the inspection process and ensure that it is completed within the thirty-day period. By contrast, the system invalidated in *FW/PBS* assigned the task of inspection to three separate agencies, none of which was under the control of the chief of police, the official tasked with enforcing the thirty-day deadline for issuing a permit. Id.

This is a matter of first impression and is a close call.[15] Nonetheless, based on the record before us, we conclude that Ordinance # 87443 does not violate the promptness requirement of *FW/PBS*. It is certainly plausible to argue that the director's deadline for issuing a permit also constrains his

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[14] *Encore Video*, 2000 WL 33348240, at *5-*6; *see also City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 604 N.W.2d 870, 880 (Wis. Ct. App. 1999) (endorsing a similar argument), *cert. granted*, 530 U.S. 1242 (2000), *cert. dismissed*, 531 U.S. 278, 148 L. Ed. 2d 757, 121 S. Ct. 743 (2001).

[15] This court did once briefly consider the question. In *Crystal Cinema v. City of Lubbock*, 149 F.3d 1179 (5th Cir. 1998) (unpublished), we held that the city's permit system for adult businesses was constitutional despite the fact that it failed to create a separate deadline for the completion of required inspections. The general forty-five-day deadline for consideration of applications was deemed sufficient, even though not all the agencies involved were under the authority of the City Secretary, the official responsible for issuing permits and denials within the specified time.

As an unpublished opinion, *Crystal Cinema* is not binding precedent. 5th Cir. R. 47.5.4. Moreover, it fails even to consider the relevance of *FW/PBS* to this issue.

discretion with respect to the scheduling of inspections. Likewise, placing the responsibility for both meeting the thirty-day deadline and carrying out the inspections in the hands of the same official makes it more likely that the deadline will be met than was the case under the system of divided responsibility reviewed in *FW/PBS*.

Because there is no evidence in the record suggesting that the Director of Building Inspections either cannot or will not be able to process adult business permit applications within the thirty-day limit, we reject Encore Videos' argument on this point. This determination, however, does not necessarily extend to other cases in which the record might reveal evidence of delays in excess of the statutory deadline.

C.

The circuits are split on the question whether *FW/PBS*'s requirement of "prompt judicial review in the event that the license is erroneously denied" requires merely prompt *access* to judicial review or a prompt judicial *decision*. *FW/PBS*, 493 U.S. at 228. Five circuits, including this one, have held that prompt access is sufficient. *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994).[16] Three others have adopted the more stringent requirement of a prompt final

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[16] *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999); *Beal v. Stern*, 184 F.3d 117, 129 (2d Cir. 1999); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993).

decision.[17] Ordinance # 87443 requires prompt access to judicial review but does not provide a time limit for a decision.[18]

The Supreme Court recently passed up an opportunity to resolve this split.[19] We therefore follow our own precedent and decide in favor of the city on this question. *See TK's Video*, 24 F.3d at 709.

The judgment is REVERSED and REMANDED for appropriate further proceedings in accordance with this opinion.[20]

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[17] *See Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 998-1000 (4th Cir. 1995) (en banc).

[18] *See* San Antonio Ordinance # 87443 § 2(f)(7) (providing for immediate access to judicial review but not imposing a time limit for decision).

[19] *See Thomas*, 534 U.S. at 325 (noting that the Court does not reach the issue despite the fact that it was one of the questions on which writ of certiorari had been granted).

[20] Because we strike down the locational restriction of Ordinance # 87443 on First Amendment grounds, we need not address Encore Videos' argument that the ordinance violates the Texas constitution.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-97-CA-1139-FB

[Filed October 2, 2000]

ENCORE VIDEO, INC.	)
Plaintiff,	)
	)
v.	)
	)
CITY OF SAN ANTONIO	)
Defendant.	)
	)

AMENDED ORDER CONCERNING PENDING MOTIONS FOR SUMMARY JUDGMENT

Before the Court are Defendant City of San Antonio's Motion for Summary Judgment and Plaintiff Encore Video, Inc.'s Motion for Summary. The Court has considered both motions and the various responses thereto. For the following reasons, the Court finds the defendant's motion has merit and should be granted.

Motion for Summary Judgment Standard

A motion for summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. Civ. P. 56(c). A dispute concerning a material fact is considered"genuine" if the evidence "is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 248 (1986). It is not the Court's function to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The Court must determine if there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. Of course, in ruling on a motion for summary judgment, all inferences drawn from the factual record is viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

If the party moving for summary judgment carries its burden of producing evidence which tends to show there is "no genuine issue of material fact, the nonmoving must then direct the court's attention to evidence in the record sufficient to establish the existence of a genuine issue of material fact for trial." Reason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996). The nonmoving party may not rely upon mere conclusory allegations to defeat a motion because allegations of that type are not competent summary judgment evidence and are insufficient to defeat a proper motion. Id. In fact, if the "nonmoving party rests merely upon conclusory

allegations, improbable inferences, and unsupported speculation," a motion for summary judgment may be granted even in cases "where elusive concepts such as motive or intent are at issue." Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994).

The party opposing the motion also may not rest on the allegations contained in the pleadings but "must set forth and support by summary judgment evidence specific facts showing the existence of a genuine issue for trial." Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). In meeting this requirement, the party must "identify specific evidence in the record" and "articulate the precise manner in which that evidence supports his or her claim." Id. Rule 56 of the Federal Rules of Civil Procedure does not impose upon this Court the "duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Id. (quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909.915-16 & n.7 (5th Cir.), cert. denied, 506 U.S. 832 (1992)). A summary judgment will only be precluded by disputed facts which are material, i.e. "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Factual disputes which are irrelevant or unnecessary to the issue will not be preclude summary judgment. Id.

Because this case is before the Court on cross motions for summary judgment, each party's motion for summary judgment must be considered separately with each movant bearing the burden of presenting evidence to support its motion. Dresser Indus., Inc. v. United States, 73 F. Supp. 2d 682, 686 (N.D. Tex. 1999); Dutmer v. City of San Antonio, 937 F. Supp. 587, 589-90 (W.D. Tex. 1996).

Defendant contends in its motion that it is entitled to summary judgment because (1) the residential area near plaintiff's business is within the city limits of the City of San Antonio (2) the ordinance, as amended, does not vest unbridled discretion in the licensor; (3) the sexually oriented business (SOB) ordinances are narrowly tailored to serve a substantial governmental interest; (4) the SOB ordinances provide for adequate alternative avenues of adult expression; (5) ordinance #87443 does not arbitrarily grandfather "Type A" nonconforming uses; (6) plaintiff's business is a sexually oriented business as defined in Ordinance #87443; and (7) the distance requirement of 1,000 feet included in the SOB ordinances is not arbitrary. Plaintiff contends in its motion for summary judgment that: (1) it has standing to bring this suit; (2) the ordinance is unconstitutional under the United States Constitution because it vests unbridled discretion in the licensor; it is not a legitimate time, place, and manner restriction because it does not materially advance the substantial governmental interest, and it does not provide adequate alternative avenues of communication; (3) the ordinance is unconstitutional under the Texas Constitution because the standard used is the least restrictive means test and the defendant has not offered any evidence that the distance restrictions are the least restrictive means necessary to advance its stated interests; (4) the City arbitrarily grandfathered sexually oriented businesses operating under a type A permit under Ordinance #82135 but did not grandfather those businesses which did not apply for a permit under that ordinance; (5) plaintiff's retail business is not an SOB under ordinance #87443, and therefore, the ordinance is being applied to it arbitrarily; and (6) the distance requirement of 1000 feet is arbitrary and capricious. The Court need not address the plaintiff's previous challenge concerning whether

plaintiff's business is within one thousand feet of a residential section because plaintiff withdrew its complaint and concedes that fact in its response to the City's Motion for Summary Judgment.

Factual Background and Procedural History of the Case

On April 27, 1995, the San Antonio City Council passed and approved Ordinance #82135 to regulate the locations available to operate sexually oriented businesses. Ordinance #82135became effective on June 1, 1995, and Ordinance #87433, which amended #82135, was passed on February 26, 1998, arid became effective March 10, 1998. These ordinances were passed out of concern about the harmful secondary effects of sexually oriented businesses on the surrounding community. The ordinances prohibit SOBs from being located within 1,000 feet of residential areas, places of worship, schools, and public parks. The ordinances also prohibit SOBs from locating within 1,000 feet of another SOB, and prohibit SOBs from the Central Business District. Plaintiff's business at its original location met the distance requirements set forth in Ordinance #82135 and was issued a certificate of occupancy without an expiration date because it was a conforming use. However, some time during the following year, plaintiff's business lost its lease and moved to a new location. This move was called to the City's attention when one of the City's sign inspectors received a complaint about a banner sign on Loop 410. Upon further inspection, plaintiff was told it needed to obtain a permit for its sign, but it could not obtain a sign permit without a certificate of occupancy which it also did not have at its new location. Encore was also given a citation for operating without a certificate of occupancy.

Encore filed a new application for a certificate of occupancy as an SOB. Its application included the affidavit of ownership, a certified survey, and the $575 fee as required by the ordinance. The new location met the 1,000 feet requirement north of Loop 410 but not on the south side of Loop 410 because of a single-family residence zoning located within the 1,000 feet restriction. Plaintiff argued it qualified for nonconforming use rights under the significant barrier provision of Ordinance #83125. Plaintiff claimed Loop 410 served as a significant barrier under the provision that allows an SOB to operate within 1000 feet of protected uses if there is a significant barrier such as a railroad right-of-way between the SOB and the protected uses.

Defendant responded by claiming that provision only applied to SOBs in existence at the time Ordinance #82135 took effect. Because plaintiff moved locations, it no longer falls under the significant barrier provision because it is now considered a new business. The City then attempted to close the business down, but plaintiff filed this suit in this Court on September 8, 1997, challenging the constitutionality of Ordinance #83135 and asking for a temporary restraining order. Although plaintiff does not have a certificate of occupancy, it is operating pursuant to the agreed preliminary injunction issued by this Court on September 18, 1997.

Ordinance #82135 was amended by the passing of Ordinance #87443 in February of 1998. Defendant states in its motion for summary judgment that the only significant differences between Ordinance #82135 and Ordinance #87443 are (1) the addition of a time limit to act on an application for an SOB certificate of occupancy, and (2) a change in the percentage of floor space dedicated to adult material in the

SOB definition. Ordinance #87443 requires the building inspector to issue or deny a certificate of occupancy within 30 days of application. Defendant contends this corrects the deficiency previously found by this Court. Plaintiff believes a deficiency still exists.

Does Ordinance #87443 Vest Unbridled Discretion in the Licensor?

In a related case, Community Visual Communication, Inc.v. City of San Antonio, SA-96-CA-1067-FB, plaintiff originally challenged Ordinance #82135 as being unconstitutional on its face because it gave unbridled discretion to the licensor. Plaintiff argued, in that case, that the Ordinance required every business falling under the definitions of the Ordinance to apply for a new Certificate of Occupancy within 90 days after receipt of the notice to apply but provided no time certain by which the licensor must either grant or deny the application for the license.[1] Therefore, plaintiff claimed the ordinance was invalid on its face as an unconstitutional prior restraint. FW/PBS, Inc. v. Dallas., 493 U.S. 215, 226-30 (1990).

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[1] The provision of Ordinance 82135 at issue read as follows:

> *New Certificate of Occupancy Required. The* business owner or the owner's agent must, within ninety (90) days after receipt of notice to apply for a new Certificate of Occupancy as one of the above three classes of property use rights as Sexually Oriented Business in order to continue such business at the existing location.

In issuing a preliminary injunction in the related case, Community Visual Communication, Inc. v. City of San Antonio, SA-96-CA-1067-FB, this Court found it was undisputed the Ordinance at issue failed to include a time limit in which a new Certificate of Occupancy would be either granted or denied. Although the application for the Certificate had to be made within ninety days after the Sexually Oriented Business received notice to apply for the new Certificate of Occupancy and the application had to be made in order to continue the business at the existing location, the Ordinance failed to provide a time frame in which the application would either be granted or denied.

Unbridled discretion is found to exist "when a licensing scheme does not impose adequate standards to guide the licensor's discretion" and "when a licensing scheme lacks adequate procedural safeguards to ensure a sufficiently prompt decision." Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005, 1009-10 (4th Cir. 1995); see FW/PBS, 493 U.S. at 225-26. An ordinance which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official--as by requiring a permit or license which may be granted or withheld in the discretion of such official--is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." FW/PBS 493 U.S. at 226 (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969)). Likewise, the failure to place time limits within which a license or certificate of occupancy is issued creates "the possibility that constitutionally protected speech will be suppressed." Id. Thus, because the Ordinance on its face failed to impose any time limit on the decision maker concerning the new Certificate of Occupancy required for a sexually oriented

businesses to continue its operation, the Ordinance was found to be unconstitutional. FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990).

Based on this Court's order in the related case, the defendant sought to remedy the unconstitutional infirmity by enacting the ordinance now in issue, Ordinance #87443. However, plaintiff contends that defendant only partially remedied the infirmity because it only addressed the first kind of unbridled discretion and not the second kind which plaintiff argues still exists.

Plaintiff contends the second kind of unbridled discretion exists when a licensor has a deadline but the necessary inspectors do not. Plaintiff argues in its motion for summary judgment that where a business is required to apply for a license and a condition to receiving that license is inspection by various departments such as fire marshal, building codes, et al., and those subordinate inspections upon which the license is contingent do not have deadlines of their own, unbridled discretion is still vested in the licensor, and the ordinance is still an unconstitutional content-based restriction.[2]

In its own motion for summary judgment and in several responses, defendant asserts Ordinance #87443 does include

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[2] Plaintiff recognizes in its motion that even content-based prior restraints may be legitimate in some circumstances but are held to the strictest scrutiny requiring the government to demonstrate a compelling interest in the restraint in order to withstand constitutional muster. Plaintiff claims there is no apparent compelling interest iterated in the ordinance, and plaintiff believes the defendant cannot enunciate such an interest now.

a time limit for when certificates of occupancy applications are to be granted or denied. The Ordinance provides that the Director of Building Inspections shall either issue or deny a certificate of occupancy to a sexually oriented business not more than 30 business days subsequent to the date of the applicant's submission of an application therefor.

Regardless of whether the application is granted or denied, the applicant is notified of the action by certified mail, return receipt requested. Further, the ordinance provides that a certificate of occupancy will not be withheld if the sexually oriented business is determined to be in compliance with all applicable sections of the Code and an appeal process is provided for any denial of a certificate. Defendant also claims the Ordinance does not involve the issuance of a license as was the case in FW/PBS, Inc. v. Dallas, upon which plaintiff relies. Instead, the Ordinance operates as a land use/zoning type regulation.

The section of the Ordinance which is still subject to controversy reads as follows:

> The Director of Building Inspections shall either issue or deny a certificate of occupancy to a sexually oriented business not more than thirty (30) business days subsequent to the date of the applicant's submission of an application therefor. If granted, the applicant shall be notified of such action by certified mail, return receipt requested. If denied, the applicant shall be notified of such action and the reason(s) therefore by certified mail, return receipt requested.

> The issuance of a certificate of occupancy shall not be withheld if the sexually oriented business is determined to be in compliance with all applicable sections of this Code.

Plaintiff argues Ordinance #87443 is still a content-based restriction because it requires the applicant to get inspections without providing any deadlines for those inspections. Plaintiff again relies on the decision in FW/PBS to support its argument.

In FW/PBS, the ordinance provided that the "chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application." FW/PBS, Inc. v. Dallas, 493 U.S. 215,605 (1990). The ordinance also provided that the "license may not issue if the 'premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." Id. The Court explained that the ordinance provided "no means by which an applicant may ensure that the business is inspected within the 30-day time period within which the license is purportedly to be issued if approved." Id. Although the city argued that applicants are given the telephone numbers for the various inspection agencies so they may contact them and arrange for these inspections, that measure was not found to place any limits on the time in which the city would inspect the business and make them eligible for a sexually oriented business license. Id. at 605-06. As a result, the city's regulatory scheme was found to allow an "indefinite postponement of the issuance of a license." Id. at 606.

As set forth above, Ordinance #87443 does not contain contingency type language similar to that found objectionable in FW/PBS. As plaintiff notes in its motion, where a condition of receiving the license is inspection by various departments such as fire marshal, building codes, et al., and those subordinate inspections upon which the license is contingent do not have a deadline of their own, unbridled discretion is vested in the licensor. However, plaintiff has not pointed out to this Court where such a condition in the Ordinance exists. In fact, it was not until the Court received Defendant's Response to Plaintiff's Motion for Summary Judgment that it understood what inspections were required to be made. According to the response, section 109.3 of the 1994 Uniform Building Code provides that the Director of Building Inspections may not issue a certificate until all necessary inspections have been completed. Defendant argues this has the "obvious effect of requiring the various inspectors to complete their inspections within the thirty-day deadline."

In City News & Novelty, Inc. v. Waukesha, 604 N.W.2d 870, 880 (Wis. Ct. App. 1999), the ordinance required that the "building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." The court was not persuaded that based on the holding in FW/PBS, the ordinance was unconstitutional. Because the ordinance provided that the inspection must occur prior to the renewal of the license, and the application had to be granted or denied within twenty-one days of receipt, the onus was on the building inspector to complete the inspection before the license was renewed. The court found the language in the ordinance did "not compare to FW/PBS because the ordinance there simply stated that a license will not be issued if the premises 'have not been

approved by the health department, fire department, and the building official.'" Id. Analogously, Ordinance 87443 requires the Director of Building Inspections, not the city police chief, to either issue or deny a certificate of occupancy not more than 30 business date subsequent to the date of the application. As defendant points out, this too requires the inspectors to complete their inspections within the 30 day period. Moreover, plaintiff has only brought forth a facial challenge to the Ordinance.[3] As written, there is no contingency language requiring inspections and plaintiff has not challenged the constitutionality of the 1994 Uniform Building Code in this case.

Is Ordinance #87443 Narrowly Tailored to Serve a Substantial Governmental Interest?

In support of its motion for summary judgment that the ordinance fulfills a substantial governmental interest, defendant attaches to its motion a copy of the unpublished

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[3] Part of the summary judgment evidence presented by the defendant is an affidavit by Jose A. "Andy" Gomez who gained knowledge of the events surrounding this case while serving as the Administrator to the Board of Adjustment. He states Encore Video met the distance requirements of Ordinance #82135 and was issued a certificate of occupancy without an expiration date because it was a conforming use. Approximately one year later, after receiving a complaint about a banner sign, Encore was given a citation for operating without a certificate of occupancy because it had moved locations without obtaining a new certificate. Encore applied for a certificate of occupancy but was denied because it did not meet the distance requirements of the ordinance. There is no mention in the record of any denials based on the lack of inspections.

opinion of the Fifth Circuit Court of Appeals in NATCO Inc. v. City of San Antonio, in which Ordinance #82135 was found to serve a substantial government interest. In the opinion, the Fifth Circuit stated:

> Ordinance #82135 is properly analyzed as a form of time, place and manner regulation. *See Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 972 F.2d 1255, 1257 (5th Cir. 1992) (noting that an ordinance that limits the areas of a city in which adult businesses may operate is properly analyzed as a time, place and manner regulation). The Ordinance presumptively violates the First Amendment unless it is"designed to serve a substantial governmental interest," and does not "unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 47, 106 S. Ct. 925, 928, 89 L.Ed. 2d 29, ___ (1986). The City bears the burden of justifying the challenged Ordinance. *See J&B Entertainment, Inc. v. City of Jackson,* 152 F.3d 362, 370 (5th Cir. 1998).
>
> The City has justified Ordinance #81235 as fulfilling a substantial governmental interest if it has shown that the City passed the Ordinance to control bad "secondary effects" associated with sexually oriented businesses. *See Lakeland Lounge,* 978 F.2d at 1257 ("Local governments can restrict adult businesses in order to control the bad 'secondary effects'"). We first note that the preamble to the Ordinance explains with great detail and specificity the secondary effects that the Ordinance was designed to address. *Cf J&B Entertainment* 152 F.3d at 374 (stating that "the mere

> incantation of the words 'secondary effects' may not save a statute 'formulated without specific attention to specific secondary effects'"). Moreover, the record evidence show that the City relied on studies provided by the City Council relating to secondary effects, and that it obtained legal advice before passing the Ordinance. Accordingly, we find that the City has justified Ordinance #82135 has fulfilling a substantial government interest.

NATCO, Inc. v. City of San Antonio, No. 98-50645 at page 5-6 (June 2, 1999). Defendant presents this decision in support of its motion because Ordinance #87443 contains the same language as Ordinance #82135 at issue in NATCO.[4] As additional support for its motion, the defendant also provides a copy of an interdepartmental correspondence sheet dated February 20, 1998, which indicates that the amending of Ordinance #82135 was initiated in order to address a ruling in the related case of Community Visual Communications, Inc. v. City of San Antonio. As a result of the ruling, the major

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[4] The preamble confirms that Ordinance 87443 mends Ordinance 82135 passed and approved April 27, 1995, and re-enacts said ordinance by regulating the location available for sexually oriented businesses, The preamble also confirms that the City relied on land use studies of Garden Grove, California, Seattle, Washington, and Austin, Texas, concerning the secondary effects of sexually oriented businesses and their effects at 1,000 feet and other studies from other Texas cities such as Austin, Houston, Dallas, Beaumont, and Amarillo and other states concerning the unhealthy sexual conduct and drug use which tends to be aggravated by sexually oriented businesses.

changes to the Ordinance #82135 were described in this interdepartmental memo as: (1) excepting airports from being included as residential zoning districts; (2) re-defining an adult bookstore; and (3) requiring the Department of Building Inspections to either approve or deny a Certificate of Occupancy Request within 30 business days. The City Attorney concluded the memo by recognizing that the First Amendment protects these businesses from unreasonable government interference and the proposed changes do nothing to infringe on those rights. A second memo dated February 24, 1998, reflects that the mayor and members of the city council were provided for review, prior to the public hearing in regard to the amendments, copies of the City of Garden Grove study, the City of Seattle study, and the City of Austin study. Copies of these studies were also attached for this Court's review.

Although plaintiff agrees this Court may consider NATCO as persuasive authority, plaintiff contends there is abundant binding contrary precedent.[5] Plaintiff contends the

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[5] Plaintiff argues that even if one or more of the NATCO plaintiffs might have made an adequate representative of the rights of the plaintiff herein, the decision of the trial court was not necessary to the decision on the merits. The Fifth Circuit noted there was no evidence that the City of San Antonio was enforcing the licensing provisions of Ordinance #82135 against NATCO because of the injunction issued in this case. Plaintiff maintains "[i]f there was no case or controversy, then the remainder of the opinion was, in fact, not necessary to the judgment. The court did not even have jurisdiction to enter an opinion once it determined there was no case or controversy. Even if the opinion may be properly used against the Plaintiff in this case as to collaterally estop the relitigation of

City required to produce at least some evidence tending to support its contention that the Ordinance is narrowly tailored to serve a substantial governmental interest. Plaintiff argues the self-serving, conclusory assertions contained in the

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certain issues, those parts of the opinion not necessary to the judgment may not. Since the parts of the opinion cited by the City of San Antonio were not necessary to the outcome of the first action, they cannot be used to preclusive effect here, especially where the plaintiff was not a party to the *Natco* action."

In reviewing the unpublished opinion, the Court notes that the Fifth Circuit found that because of the preliminary injunction issued in this case, the City conceded the licensing provision of Ordinance ¢/82135 were unconstitutional and as a result, the City has not enforced the licensing provisions against NATCO. The court found that "on this issue there is no case or controversy." The opinion continues by indicating that NATCO was arguing on appeal that the district court erred in finding the location restrictions were content-neutral time, place, and manner restrictions. Because of the presumption that the ordinance violates the First Amendment unless it is designed to serve a substantial governmental interest and does not unreasonably limit alternative avenues of communication, the court was required to discuss whether #82135 fulfilled a substantial governmental interest. The court concluded the evidence was sufficient to support such a finding.

This Court also reviewed the file in the NATCO, Inc. v. City of San Antonio case concerning the issues raised. The Court found that plaintiff's counsel herein was involved as counsel in that litigation, and in the Plaintiffs' Response Defendant's Summary Judgment Motion and Incorporated Cross-Motion for Summary Judgment raised the argument that the remainder of the ordinance, excluding the licensing scheme, was not content neutral.

preamble are insufficient and defendant cannot simply rely on the unpublished opinion without precedential value which found the prior Ordinance #82135 constitutional when that finding was not necessary to the holding in the case. Despite this assertion, plaintiff notes in a footnote that the City Council was not required to prove that it relied on the studies again when it passed the successor Ordinance #87443 if the City showed that the City Council or its legislative drafters actually relied upon the recited studies in the passage of Ordinance #82135.

Before addressing the ordinance at issue herein, the Court would like to point out a recent decision from another circuit in which the court held the circuit rule declaring unpublished opinions are not precedent as unconstitutional under Article III "because it purports to confer on the federal courts a power that goes beyond the 'judicial'". Anastasoff v. United States, No. 99-3917EM, 2000 WL 1182813 at "1 (8th Cir. Aug. 22, 2000). Rule 28A(i) in that circuit provided:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well ....

Id. at *2. Similarly, the rule in this circuit provides:

> Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document ....

5th CIR. R. 47.5.4. Given the similarities in the rules, this Court notes the beginning of a possible trend and finds the discussion of the issue worth consideration by this circuit given the previous ruling in NATCO on the same issues by the Fifth Circuit. The court in Anastasoff began its discussion as follows:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.

Id., at *2. The court further explained that it in no way meant to suggest that the Framers expected or intended the

publication (in the sense of being printed in a book) of opinions." Id. at *4. In fact, the judges and lawyers of that day"recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum." Id. The court went on to acknowledge that the case was not about whether opinions should be published but rather about their authoritative effect. Id. at *5. The fact a decision is unpublished does not equate to it being "secret." To that court's knowledge, "every opinion and every order of any court in tiffs country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled 'published' or not, available to anyone on line." Id.

The court also addressed the practicalities of the matter as follows:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts

> have tho following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us .what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

Id. The court also acknowledged that it was not advocating a rigid doctrine of eternal adherence to precedent but only that precedent be changed if the reasoning of the case is exposed as faulty or other exigent circumstances exist which require such change. Any such departure from precedent should be clearly stated and the reasoning for the departure clearly explained. Id.

The court concluded that the discretion to depart from the law set out in a prior decision without any reason to differentiate the case and even though the earlier decision may be well-considered and directly on point is "inconsistent with the doctrine of precedent; even in constitutional cases, courts 'have always required a departure from precedent to be supported by some "special justification"'". Thus, the rule which allows courts the complete discretion to determine which judicial decisions will bind it and which will not is unconstitutional, Id. at *6.

Likewise, this Court respectfully requests that reconsideration of the rule be made in this circuit because this

Court would have been aided had the NATCO decision been binding precedent. Having so said, the Court will return to the issues at hand.

In deciding whether an ordinance is designed to address undesirable secondary effects and is therefore content-neutral or is intended instead to suppress speech, courts "must give great deference to the stated goals of the City Council." N.W. Enters. Inc. v. City of Houston, 27 F. Supp. 2d 754,776 (S.D. Tex. 1998). "It is the legislature, and not the courts, which determines how much testimony is enough to require city action in redressing a perceived problem." Id. (quoting SDJ v. City of Houston, 636 F. Supp. 1359, 1367 (S.D. Tex. 1986)). Although the purpose statements contained in the preamble of an ordinance are relevant, a court should not rely exclusively on a city council's conclusory statements concerning its intent. Id. A court must also consider "whether the City Council relied on evidence in the legislative record from which it could have reasonably determined that negative secondary effects associated with adult businesses actually exist and that the proposed regulations would in some way address these effects." Id. The court required the City of Houston, in that case, to show that in adopting the ordinance the members of its city council had a "reasonable basis for believing that these provisions would address negative secondary effects actually and currently attributable to sexually oriented businesses in Houston. The Court cannot merely surmise this fact from vague references to evidence in other cities or surmise the current validity of the City Council's purported beliefs regarding specific secondary effects from previous evidence used to support earlier versions of the Ordinance." Id. at 778.

In reaching this conclusion, the court referred to the opinion in Lakeland Lounge v. City of Jackson, 973 F.2d 1255 (5th Cir. 1992), which was cited by the Fifth Circuit in deciding NATCO. In Lakeland, the record provided sufficient information to show the city council had sufficient information to review in order to enact a permissible ordinance. Id. at 1258. First, the court noted that the office of planning, city attorney's office, and the ordinance review committee were found to have drafted the ordinance and it was without question that the drafters considered and relied on the studies concerning secondary effects of sexually oriented businesses while drafting the amendment. Id. The court found it permissible for the city council to place reliance on 'others to do research because "state law requires that the planning board make recommendations to the council regarding zoning amendments." Id. The court also found it was not necessary for the evidence to show the council members personally reviewed the studies of effects. Id. Second, although the evidence showed the city council did not receive a report or summary of the studies, a meeting was held at which five of the seven members of the city council were present and at this meeting, various persons discussed the secondary effects and the work that had gone into the preparation of the proposed ordinance. Id. Third, the court relied on the language contained in the amendment which indicated the concern by the city council of the secondary effects. The court recognized the preamble language might not save a statute formulated "without specific attention to secondary effects." However, in the context of the case where:

> (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the councilmembers did receive some information about

> the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggest impermissible motives on the part of the councilmembers, the language of the preamble show the city council's awareness of the studies upon which the planning staff relied when flaming the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance.

Lakeland, 973 F.2d at 1259; see J&B Entertainment, Inc. v. City of Jackson, 152 F.3d 362, 372, 374 (5th Cir. 1998) (stating Lakeland "is consonant with our case law upholding ordinance regulating adult entertainment where the government has introduced sufficient evidence to justify the ordinance on the basis of preenactment legislative findings and reaffirming a preambulatory clause may be used as evidence in support of an ordinance if properly explained).

Here, the record indicates that copies of the studies were provided to the mayor and city council members for review along with interdepartmental memos concerning the amendment from the City's attorney prior to its passage. The lengthy and detailed preamble contained in Ordinance #82135 as well as in #87443 provides evidence that the City Council members had a reasonable basis for believing the ordinance would address negative secondary effects actually and currently attributable to sexually oriented business in San Antonio.[6] Moreover, this Court is also persuaded by the

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[6] The preamble provides evidence that the council relied on land use studies of secondary effects of sexuallyes and a study of sexually oriented business effects at 1,000 feet; the objectives considered by

decision in NATCO which found the City's evidence sufficient to support a finding that the predecessor ordinance to #87443, ordinance #82135 originally at issue in this case, fulfilled a substantial governmental interest.[7]

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the; the council's concern about the atmosphere of public places in the City caused by allowing sexually oriented businesses to be legally located next door to another business; the adverse impact on property values and family activities; that zoning is a legitimate and reasonable restriction to ensure sexually oriented businesses are located to minimize the adverse secondary effects; the possible harmful effects on children and minors exposed to such businesses; council's desire to minimize and control the negative effects and protect the health, safety, and welfare of the citizens; a finding by the council that it is appropriate to amortize those sexually oriented businesses located within 1000 feet of a protected property; that the council considered decisions of the Supreme Court regarding the regulation of sexually oriented businesses; council's intent not to discriminate on the basis of gender but to enact a zoning ordinance which addresses the negative secondary effects on nearby property and on children; and that council's intent is not to suppress speech related activities protected by the First Amendment but to enact a zoning ordinance which *addresses the* negative secondary effects of sexually oriented businesses on certain nearby property and children.

[7] Because the *NATCO* case was originally decided by Judge H.F.Garcia, who also sits in the San Antonio Division of the Western District of Texas, the court was able to view the file and therefore the evidence which supported his finding the ordinance content neutral. In his opinion, Judge Garcia references that the City showed it considered land use studies from no less than fifteen cities and considered decisions of the United States Supreme Court in drafting its ordinance. The City had attached to its motion for summary judgment filed on June 24, 1997, affidavits from the

Despite the foregoing, plaintiff also argues in its response to defendant's motion for summary judgment that in addition to proof that the City relied on studies or other extrinsic evidence the City must show actual justification for the increase in distance restrictions from Ordinance #49724 in which the distance restriction was 500 feet. In support of this assertion, plaintiff relies on N.W. Enters, Inc. v. City of Houston, 27 F. Supp. 2d 754 (S.D. Tex. 1998).

In N.W. Enters., the plaintiffs challenged the increase of the minimum distance between adult businesses and protected land uses from 750 to 1,500 feet and the increase from 1,000 to 1,500 the radius for calculating residential areas. Id. at 800. Plaintiffs' primary argument was the City enacted the increases 'without considering any new studies or evidence which establishes that the 750 and 1,000 foot distances required by the previous version of the Ordinance were insufficient to satisfy the legislative interests that the district court and the Fifth Circuit acknowledged existed in SDJ." Id. Plaintiff also argued that the adverse secondary effects the City claimed the increase distance requirements would address did not actually exist or at a minimum, fact issues existed as "whether these alleged effects exist and whether the new

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Mayor of San Antonio and one of the city council members at the time Ordinance #82135 was passed and who were named as defendants in that case. Both the mayor and council member stated they participated in city council meetings and executive sessions regarding the proposed ordinance and voted to approve the ordinance "based upon studies provided to the city council regarding the secondary effects of sexually oriented businesses, and also based upon legal advice received by the city council from the city's legal department."

requirements will actually alleviate such effects." Id. at 801. In response, the court explained:

> It is not this Court's role to weigh competing evidence on these factual issues or even to determine whether the evidence upon which the City claims to have relied was highly probative or reliable. This Court is not permitted to examine Plaintiffs' substantive policy arguments regarding the accuracy of the committee's purported findings or the impact, or lack of impact, sexually oriented businesses in Houston actually have on surrounding areas. In SDJ, the district court likewise declined to consider the plaintiffs' policy arguments against the 1986 version of the Ordinance and rejected the plaintiffs' proffered evidence by explaining that "[t]he fact that other experts hold conflicting opinions on the effects of sexually oriented businesses on property values is irrelevant to the Court's first amendment inquiry." This Court's duty instead is merely to determine whether the City Council had before it at least a requisite, albeit relatively minimal, amount of evidence to support each of the challenged amendments to the Ordinance .... [T]he relevant issue to the question of whether each challenged amendment is content-neutral is whether the City Council's Sexually Oriented Business Committee had before it even a minimal threshold amount of evidence upon which a reasonable Council member could have relied in determining whether the purported negative secondary effects actually exist and whether the amendment to the Ordinance would some how help alleviate those effects.

Id. at 801. After reviewing the record, the court concluded that the increase in distance requirements was not based "on any evidence of secondary effects that specifically justify these increases." Id. Both the preamble to the ordinance and the transcripts of city council meetings revealed that "Committee members believed that they could impose whatever locational restrictions they wanted on adult businesses so long as the restrictions let those businesses with adequate number of alternative sites to which they could legally relocate." Id. In defense of the ordinance, the City tried to rely on evidence documents in the legislative history for previous versions of the ordinance. Although the court recognized this was the type of evidence that might have been relevant to the case if it had in fact been considered, there was no indication that anyone, i.e. council members or their staffs or the city's legal department,"actually contemplated how this eleven to fourteen year-old factual matter could support the increased distance requirements the City enacted." Id. at 803. The court mentioned in a footnote that it "searched the legislative record in vain for evidence that someone, such as Council members, staff, or legal advisers looked at specific evidence from Houston's earlier legislative histories, or even studies from other cities in the process of formulating the new distance requirements." Id. at 803 n. 102.

Based on the copy of the previous Ordinance #49724 provided by the plaintiff, the Court finds that ordinance was enacted in 1978. Defendant has produced evidence that the city council members were provided with copies of at least three recent land use studies of secondary effects of sexually oriented businesses conducted in 1991, 1989, and in 1986. The 1986 study studied the effects of sexually oriented businesses at 1,000 feet. Council members indicated in the

preamble their concern about the atmosphere of public places caused by allowing sexually oriented businesses to be legally located next door to another such business, allowing them as close as 500 feet from the property line of residential property, allowing them next door to churches, parks, secondary and primary schools and their concern about the adverse impact on property values and family activities given that such close proximity to the aforementioned land uses can reduce the value of residential property, reduce retail trade in the vicinity, reduce family use of nearby public and generally reduce property values and tax revenues to the City.

Therefore, unlike the City of Houston, the City of San Antonio had before it studies a link to the increase in distance requirements and evidence to show the council members provided with these studies. This is sufficient to uphold that requirement. See FW/PBS Inc. v. City of Dallas, 493 U.S. 215,236 (1990) (1977 study by city of Los Angeles that cursorily considered the effect of adult motels on surrounding neighborhoods combined with reasonableness of legislative judgment adequate to support city's determination about motels permitting room rentals for fewer than 10 hours to be included in licensing scheme); N.W. Enters., Inc. v. City of Houston, 27 F. Supp. 2d 754, 811 (S.D. Tex. 1998) (recognizing that Supreme Court rejected in FW/PBS the argument that City had no basis to conclude rental of motel rooms for fewer than 10 hours produced adverse secondary effects because the city council had before it a 1977 study that cursorily considered the effect; this was adequate to support city's determination). Accordingly, this Court finds the ordinance is narrowly tailored to serve a substantial government interest.

Does the Ordinance Provide Adequate Alternative Avenues?

Relying on the holding in NATCO, Inc. v. City of San Antonio, defendant contends in its motion for summary judgment that adequate alternative avenues of communication exist under Ordinance #87443 because it contains the same language and covers the same area as Ordinance #82135. With respect to Ordinance #82135, the Fifth Circuit held, although in an unpublished opinion, that alternative avenues of communication exist:

> We also find that the City has met its burden to show that alternative avenues of communication exist. Although NATCO claims that Ordinance #82135 disburses sexually oriented business to areas in Bexar county where it is impossible to operate, the record evidence show that the City has granted permits to five sexually oriented businesses allowing them to operate indefinitely. NATCO has not offered any evidence that counters this summary judgment evidence.

NATCO v. City of San Antonio, No. 98-50645 (5th Cir. June 2, 1999) at page 6. Defendant points out in its motion that Ordinances #82135 and #87443 do not attempt to ban SOBs altogether but regulate SOBs in certain areas of the City. In support of its motion, the affidavit of Jose A. Gomez is attached. Mr. Gomez gained his knowledge while serving as Administrator to the Board of Adjustment. He is presently employed as Development Services Ombudsman for the City of San Antonio Buildings Inspections Department.

According to Mr. Gomez, prior to the adoption of Ordinance #82135, the City developed a list of existing SOBs located in the City of San Antonio and found a total of 30. Each SOB was then notified of the impending ordinance and were advised of the new regulations. Of the 30 SOBs listed, 4 or 5 were no longer in operation when the ordinance went into effect. Six of the 30 SOBs notified met the 1,000 foot separation requirement in the ordinance. These six were all issued certificates of occupancy without expiration dates. Fifteen of the SOBs operating at the time requested a hearing for a Type A permit. Five of these permits were granted, and the remaining SOBS were granted Type B nonconforming use rights for a period of one year. At the end of one year, these SOBs had either to shut down or apply for amortization.

Mr. Gomez also stated that since the passage of Ordinance #87443, one SOB had been approved for a Certificate of Occupancy and three more are in the planning/construction stages. The City anticipates that each of these SOBs will apply for a certificate of occupancy when construction is completed.

Plaintiff argues in its motion for summary judgment that there are not an adequate number of sites which are legally and physically available. At a minimum, plaintiff claims the City has the burden of coming forward with at least two legally and physically available sites (one for the plaintiff and one for the plaintiff in the companion case, Community Visual Communication, Inc. v. City of San Antonio). Plaintiff also argues the City's reliance on the affidavit of Mr. Gomez is misplaced. Mr. Gomez fails to specify the existence of alternative avenues at all or fails to show the existence of property he or the City contend meet the requirements of the ordinance.

As set forth in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986), "the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." Defendant has previously defended this same issue before the Fifth Circuit Court of Appeals and based on the record which apparently showed that the City had granted permits to five sexually oriented businesses, the City was found to meet its burden. The affidavit by Mr. Gomez in this case shows that at the time the Ordinance #82135 was passed six out of 30 of the SOBS in existence met the distance requirements. Since the passage of the amendment, Ordinance #87443, one SOB has been approved for a certificate of occupancy and three more are in the planning stages. This implies that there are available sites within the City of San Antonio. Plaintiff has not provided summary judgment evidence to the contrary. Therefore, this Court agrees with the finding by the Fifth Circuit Court of Appeals that the City has met its burden that alternative avenues of communication exist.[8]

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[8] The Court would have been aided in its determination as to alternative avenues of communication if additional evidence as to available locations would have been provided. Perhaps because the type of evidence relied on is the same type of evidence found to be sufficient in NATCO for both the court sitting in the same division as Court and the Fifth Circuit Court of Appeals, the City found it unnecessary to provide anything additional. Plaintiff did not attach any affidavits to its motion for summary judgment indicating it could not find a operate in the City after the City showed that new SOBs are in fact finding places to operate in the City.

Does Ordinance #87443 Arbitrarily Grandfather "Type A" Nonconforming Uses?

According to the complaint, plaintiff argues Ordinance #87443 purports to grandfather "Type A" nonconforming uses which had a Type A permit under the facially void Ordinance #82135. Businesses which did not apply for Type A use because the ordinance was not valid. and/or businesses which were established or became non-conforming under the facially invalid Ordinance #82135 are ineligible for grandfathering. Plaintiff claims that because whether a business was or was not licensed under the facially unconstitutional ordinance #82135 is irrelevant, such a distinction under Ordinance #87443 is arbitrary and therefore void, of no force and effect. In particular, plaintiff argues that the City allowed businesses with a significant barrier between it and protected uses to continue in operation if it got a permit under the facially unconstitutional ordinance #82135 but did not permit those businesses which began operating after the passage of ordinance #82135 and did not apply fora permit under the unconstitutional ordinance #82135 to obtain the same advantage. To permit this sort of blatant favoritism is, according to plaintiff, to reward the City for passing an unconstitutional ordinance and to punish the citizenry for ignoring or actively fighting in court an unconstitutional ordinance.

In response to plaintiff's argument, defendant City argues it is not engaging in blatant favoritism as plaintiff argues nor is it punishing businesses which either ignored or litigated the constitutionality of Ordinance #82135. Ordinance #87443 incorporates into its languages those SOBs that were eligible for and which were granted Type A permits under the prior

ordinance. Plaintiff's business was issued a certificate of occupancy under Ordinance #82135 because it was a conforming use at the time. However, once plaintiff moved locations, it was not eligible for a Type A permit and therefore, the Type A provision of #82135 does not apply to plaintiff's business. Plaintiff could have applied for a Type B permit and for amortization but it chose not to do so. Defendant argues that plaintiff does not qualify under the language of Ordinance #82135 and its claim of arbitrary grandfathering is without merit.

Ordinance #87443 was enacted in reaction to this Court finding the provision concerning the time in which an application was to be granted or denied unconstitutional. The Court issued no opinion concerning the Type A nonconforming use permit, and the ordinance provided that if any section, subsection, sentence, clause or phrase was found to be unconstitutional, that holding would not affect the validity of the remaining portions of the ordinance. Ordinance #82135 established Type A and Type B Nonconforming Use Rights for Sexually Oriented Businesses. The ordinance provided in Section 2(c) Nonconforming Rights the following:

> *Establishment of Type A and Type B Nonconforming Use Rights for Sexually Oriented Businesses.* This ordinance will apply to each existing Sexually Oriented Businesses [sic] after the business owner or operator or agent of the owner or operator receives written notice from the Director of Building Inspections that each such business must within ninety (90) days after receipt of such notice, apply for one of the following three classes of property use rights hereby created and

established, as part of the application for a new Certificate of Occupancy.

There appears to be no dispute that plaintiff's business at the time of the enactment of this ordinance was a conforming use.

Ordinance #87443 was an ordinance "amending ordinance 82135 passed and approved April 27, 1995, and re-enacting said ordinance by regulating the locations available for sexually oriented businesses." The Nonconforming Rights provision of Ordinance #87443 provides:

> Commentary: Type A nonconforming use rights extend to those establishments granted such rights pursuant to the methodology established by Ordinance 82135, passed, and approved April 27, 1995, and this Ordinance and are subject to Section 35-3065 of this Code except for amortization at the direction of City Council. Type B nonconforming use rights extend to all other establishments that were lawfully in operation either prior to the adoption of this section or outside of the City's corporate limits; but, as a result of the adoption of this section, or annexation after the adoption of this section, continued operation of the establishment is unlawful. A conforming use is one that is operating in a lawful manner consistent with the provisions of this section. (Section 2(d)).
>
> Any business that holds a certificate of occupancy issued for a sexually oriented business pursuant to the provisions of Ordinance 82135 of April 27, 1995 is not required to re-apply, and all such certificates of occupancy are hereby confirmed. Provided however,

that any Type B Certificate of Occupancy that has or would expire prior to the enactment of this ordinance is hereby extended to expire at 12 o'clock midnight on March 10, 1999. (Section 2(d)(2)).

Type A Nonconforming rights pre-dating protected use within 1000 feet. Any sexually oriented business legally operating on and After April 27, 1995, which is rendered nonconforming by the subsequent location of a protected use or a protected zone within the protected distance, shall have Type A Nonconforming Use Rights. (Section 2(f)(2)).

Section 3 of Ordinance #87443 provides as follows:

The Nonconforming Use Determination Board established by ordinance 82135, passed and approved April 27, 1995, is hereby authorized to continue its duties for 90 days after the effective date of this ordinance. Thereafter, said Board shall be disempowered. Said Board shall consist of the Chief of Police, the Director of Planning, and the director of Asset Management, or duly authorized representatives, who shall hear evidence and determine all written requests for Type A Nonconforming Use Rights as follows:

Properties which are already devoted to Sexually Oriented Businesses as of the effective date of this ordinance shall have the option to apply for Nonconforming Use Rights. The Nonconforming Use Determination Board will grant Type A Nonconforming Use Rights for a Sexually Oriented

> Business if the Board finds that...[the Sexually Oriented Business] (2) is separated from single family residences, churches, synagogues, mosques, or other religious facilities used primarily for religious worship, any public or private elementary, secondary or high schools, public parks, and other sexually oriented businesses by less than 1,000 feet but such uses are separated from the sexually oriented business by an active railroad right-of-way, multi-laned interstate highway or similar significant barrier that acts as a barricade buffering such uses.

According to Plaintiffs Second Amended Complaint, plaintiff moved its existing business on or about September 1, 1997, when Ordinance #82135 was in effect. Because that provision of the ordinance had not been held unconstitutional, the plaintiff knew what the requirements were to a certificate of occupancy under that ordinance and that there were there were no provisions significant barriers for new businesses. The Court does not find this arbitrary and capricious.

As for Ordinance #87443, it appears, based on the wording contained in Section 3, Ordinance #87443 allowed the Nonconforming Use Determination Board to continue its duties for 90 days to hear evidence and determine all written requests for Type A Nonconforming Use Rights for properties which were already devoted to SOBs as of the "effective date of this ordinance." Section 11 of the ordinance provided the effective date of the ordinance as March 10, 1998. There is no evidence that plaintiff tried to apply at that time as an existing business and was denied a Type A Nonconforming Use Right. Moreover, plaintiff has not cited any authority for the proposition that an ordinance must provide the same

nonconforming exceptions for new businesses as it does for existing businesses. Given that plaintiff was a conforming business at the time Ordinance #82135 was passed and was aware of the guidelines when it moved locations and thus became a new business under the ordinance, the Court does not find the ordinance arbitrary and capricious.

Is Plaintiff's Business a Sexually Oriented Business Under Ordinance #87443?

Plaintiff argues that it is not a sexually oriented business under the Ordinance and therefore the Ordinance is being applied to it arbitrarily. Plaintiff appears to argue that because all of its inventory is for off-premises consumption only, it does not fall under the Ordinance. However, the language of the Ordinance reads that an adult bookstore is "an Adult Bookstore, Adult Novelty Store, or Adult Video Store where more than 20% of its inventory (that is offered for sale, rental or viewing for any form of consideration to on-premises customers) consists of..." The Court does not find plaintiffs' argument plausible that the ordinance's requirement of on-premises consumption applies to inventory offered for sale or rental.

Plaintiff also argues that less than 20% the floor space of its business is dedicated to inventory which is subject to the Ordinance. In support of its arguments, plaintiff attaches the affidavit of Glenn Chase, the president of Encore Video, Inc. Although plaintiff alleges in its motion that less than 20% of the floor space is dedicated to inventory which is the subject of the ordinance, there is no statement in the affidavit or any other evidence submitted by the plaintiff which supports that assertion.

Defendant contends plaintiff falls under the definition as set forth in the ordinance and would not have standing to pursue to this litigation if it was not operating as an SOB. In addition, when required to apply for a certificate of occupancy, plaintiff applied as an SOB.

The Court has considered plaintiffs arguments and defendants response, and finds no summary judgment evidence to support a finding that plaintiff's business does not fall within the definition contained in the Ordinance now in issue.

Is the Distance Requirement of 1 000 Feet Arbitrary and Capricious?

In discussing whether the Ordinance at issue was narrowly tailored to serve a substantial governmental need, the Court looked at what evidence the City had before it in enacting the new Ordinance and the new distance requirement. As defendant argues in its motion, the increase arose from evaluating several studies which were conducted after its Ordinance setting the distance at 500 feet was enacted. Copies of these studies have been provided to the Court. In addition, the preamble to the ordinance indicates the increase was meant to combat the negative secondary effects of those businesses on the surrounding community. Having previously discussed the evidence, the Court agrees with the defendant that the distance requirement is not arbitrary and capricious.

Does the Texas Constitution Provide Even Greater Protection Than The Federal Constitution on the Question of Prior Restraint?

Plaintiff contends in its motion for summary judgment that the Texas Constitution and related case law provides even greater protection than the federal constitution on the question of prior restraint. In Texas, the proponent of the local restriction has the burden of showing that the location restriction is the least restrictive means of preventing or mitigating secondary effects while still providing access. In response, defendant relies on the decision on Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995), which it claims holds the standard is the same for evaluating the Ordinance under the Texas Constitution.

In Woodall, the plaintiffs maintained that the standard for determining the validity of an El Paso Ordinance was different under the Texas Constitution, and they were entitled to pursue a separate claim because of that difference. Id. at 1127. The court first set out the applicable provisions from both constitutions and then explained:

> The Texas Supreme Court has held that free speech rights under the Texas Constitution may be broader than those provided by the Federal Constitution in certain cases. The Adult Businesses argue that under Davenport the free speech clause of the Texas Constitution requires the City to show that the Ordinances protect a "compelling government interest" and are the "least restrictive means" possible to protect this interest, whereas under Renton the United States Constitution only requires the City to

show that the Ordinances protect a "substantial government interest" and do not "unreasonably limit" alternative avenues of communication.

The district court determined that the greater protections set out in Davenport apply only to prior restraints and not to time, place and manner restrictions in land use restrictions of sexually oriented businesses. The district court noted that Lindsay v. Papageorgiou, 751 S.W.2d 544 (Tex. App.-Houston [1st Dist.] 1988, writ denied), the only Texas case directly on point, held that the Renton standard applies under Texas Constitution as well as under the United States Constitution. The Adult Businesses contend that the Davenport. standard was extended to land-use cases in Ex Parte Tucci, 859 S.W.2d 1, and that Lindsay has been impliedly overruled. We are unpersuaded.

In Tucci, a plurality of Justices held that the Davenport standard should have been applied to a temporary restraining order which regulated abortion protest during the 1992 Republication Party Convention in Houston, Texas. The Tucci Court addressed the applicability of Davenport to restrictions on political protest. It did not address whether the more stringent standard was applicable in land-use cases involving adult businesses. The simple fact of the matter is that there is no direct Texas authority supporting the Adult Businesses' position that the Davenport standard should be expanded to land-use cases involving adult businesses, and the only Texas authority directly on point opted for the Renton

> standard. If the intermediate Texas courts are wrong about Texas law in this area, we are content to wait until the Texas Supreme Court corrects their error. We hold that the Adult Businesses' claims under the Texas Constitution should be determined under the same standard as used under the United States Constitution.

Woodall, 49 F.3d at 1127-28 (citations omitted). Since Woodall, there has been no Texas Supreme Court case addressing the issue. However, another intermediate Texas court refused to be persuaded as was the court in Woodall that the decision in Tucci impliedly overruled Lindsay. The court noted:

> It has been argued, although not in this case, that Tucci (decided after Lindsay) impliedly overruled Lindsay. We are not persuaded by that argument. Tucci concerned political speech the most protected form of speech. No mention is made in Tucci regarding sexually oriented expression, nor of the Lindsay decision. In addition, the Fort Worth Court of Appeals has since held that the broader Texas free speech protection found in Tucci does not extend to exotic dancing. The basis for these holdings is that there is less interest in protecting "material on the borderline between pornography and artistic expression than in free dissemination of ideas of social and political significance." We so hold.

Kaczmarek v. State, 986 S.W.2d 287, 291 (Tex. App.-Waco 1999, no pet.). Based on the foregoing, this Court agrees with the defendant that whether the ordinance is reviewed under the Texas Constitution or the United States Constitution, the same

standard is to be applied. As such, request for a least restrictive means review is denied and the challenges to the ordinance upheld as constitutional under Texas law as well.

Accordingly, based on the foregoing, IT IS HEREBY ORDERED that Defendant City of San Antonio's Motion for Summary Judgment as to all of plaintiff's claims herein (docket #39) is GRANTED, Encore Video, Inc.'s Motion for Summary Judgment (docket #54) is DENIED, and this case is DISMISSED.

It is so ORDERED.

SIGNED this 2nd day of October, 2000.

/s/_____
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-97-CA-1139-FB

[Filed September 26, 2000]

ENCORE VIDEO, INC.	)
Plaintiff,	)
	)
v.	)
	)
CITY OF SAN ANTONIO	)
Defendant.	)
	)

JUDGMENT

On this date came on to be considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order Concerning Pending Motions for Summary Judgment filed in this cause on this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that all of plaintiff's claims have been addressed by this Court and defendant's motion for summary judgment (docket #39) is GRANTED and this case is DISMISSED. IT

IS FURTHER ORDERED that motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 26th day of September, 2000.

/s/_____
Fred Biery
United States District Judge

APPENDIX D

SAN ANTONIO, TEXAS

ORDINANCE 87443

Passed and Approved February 26th, 1998.

Effective date of March 10th, 1998.

Amending Ordinance 82135, passed and approved April 27, 1995, and re-enacting said Ordinance by regulating the locations available for sexually oriented businesses by requiring a distance of 1000 feet or more from other sexually oriented businesses and 1000 feet from residential property, religious worship facilities, schools, and parks; requiring application for nonconforming rights; requiring statement of intent to use a location for sexually oriented business on application for certificate of occupancy, and requiring a certified survey of distances from protected uses/zoned property and affidavit of ownership; replacing two and adding additional definitions applicable to City Code Section 35-3305, entitled "Adult Entertainment", expanding such zoning regulations to include all sexually oriented businesses; prohibiting such businesses in the central business district; making violations a misdemeanor crime and providing penalties, not to exceed $2000 per violation; providing for severability; providing for publication; and declaring an effective date of March 10, 1998. (Also amending Chapter 35 of the City Code.)

San Antonio, Texas Ordinance 87443 -
Passed and approved 2/26/98; Effective date 3/10/98

WHEREAS, recent land use studies of secondary effects of sexually oriented businesses were conducted in Garden Grove, California in 1991 and Seattle, Washington in 1989, which included surveys of real estate appraisers, commercial businesses, residential owners, and parents; as well as the Austin, Texas 1986 study of sexually oriented business effects at 1,000 feet; and

WHEREAS, the city councils of those cities concluded that there was convincing evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing, among other adverse secondary effects, downgrading of property values; and

WHEREAS, available studies from the Texas cities of Austin, Houston, Dallas, Beaumont. Amarillo, and from other states, such as Indianapolis, Indiana; Las Vegas, Nevada; Seattle, Washington; Phoenix, Arizona; and others, concluded that unhealthy sexual conduct and drug use tends to be aggravated by sexually oriented businesses, including, but not limited to, prostitution, pandering, exposing impressionable minors to harmful materials, possession and distribution of obscene materials, and possession and distribution of controlled substances; and

WHEREAS, the City Council has considered each of the following objectives: (a) areas close to single and multiple family dwellings should be free of sexually oriented businesses; (b) areas where children could be expected to walk, patronize, or frequent should be free of sexually

oriented businesses; (c) sexually oriented businesses should be located in areas of the City which are not in close proximity to residential areas, churches, parks, public and private elementary schools, secondary (middle) schools, or high schools, or near other sexually oriented businesses; (d) the image of the City of San Antonio as a family oriented, pleasant and attractive place both to reside and to take the family for vacation should be protected from the adverse affects of sexually oriented businesses being in close proximity to residential land uses, churches, public parks, schools, and the Riverwalk, Alamo, Institute of Texan Cultures, Spanish Governor's Palace, Hertzberg Circus Museum, La Villita, and similar family oriented attractions in the Central Business District; (e) any sexually oriented business land use should be regulated by zoning to separate such land uses by a distance of 1000 feet from certain other uses just as other non-compatible land uses are separated; and

WHEREAS, this City Council is concerned about the atmosphere of public places in the City caused by allowing sexually oriented businesses to be legally located next door to another such business, allowing them as close as 500 feet from the property line of residential property, allowing them next door to churches, parks, secondary and primary schools, and allowing them in the downtown Central Business District if in compliance with the 1000 feet spacing restriction; and

WHEREAS, the City Council is concerned about the adverse impact on property values and family activities, including family vacations, given that such close proximity to the aforementioned land uses can reduce the value of residential property, reduce retail trade in the vicinity, reduce family use

of nearby public parks, and generally reduce property values and tax revenues to the City; and

WHEREAS zoning is a legitimate and reasonable restriction to ensure that sexually oriented businesses are located only in places which minimize the adverse secondary effects, which usually accompany sex related enterprises, on nearby property; and

WHEREAS, the City recognizes the possible harmful effects on children and minors exposed to such businesses, the deterioration of respect for family values if accepted as an integral part of a residential neighborhood, and other social harms that results from allowing sexually oriented businesses in locations which children frequent and daily family activities are conducted, but the City is not basing the enactment of this ordinance on moral principals upon which people disagree, but upon well established real estate appraisal principles, social study axioms, and municipal studies of such businesses' associated criminal behavior; and

WHEREAS, the City Council desires to minimize and control these negative effects and thereby protect the health, safety, and welfare of the citizens; preserve the quality of life; preserve property values, preserve its reputation as a family vacation destination, and the character of surrounding neighborhoods and businesses; thereby deterring the spread of urban blight and, as a positive byproduct, reduce the danger of sexually communicable diseases through casual sexual liaisons incited by under-regulated sexual entertainment; and

WHEREAS, in furtherance of the public purposes, noted above, the City Council finds it appropriate to amortize those sexually oriented businesses located within 1000 feet of a protected property or within the central business district; and

WHEREAS, the City Council has considered the decisions of the Supreme Court regarding local regulation of sexually oriented businesses, including, but not limited to, *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976) *reh. denied* 429 U.S. 873; and *Renton v. Playmate Theaters*, 475 U.S. 41 (1986) *reh. denied* 475 U.S. 1132; and

WHEREAS, it is not the intent of this ordinance to discriminate on the basis of gender, but to enact a zoning ordinance which addresses the negative secondary effects of sexually oriented businesses on certain nearby property and on children who live, shop, or play in the vicinity and which makes gender based distinctions by regulating the covering of female breasts to the extent that physical characteristics require these distinctions recognizing that physiological and sexual distinctions exists between the male and female breast, and female breasts differ both internally and externally from male breasts, and the female breast, but not the male breast, is a mammary gland; and

WHEREAS, it is not the intent of this ordinance to suppress speech related activities protected by the First Amendment, but to enact a zoning ordinance which addresses the negative secondary effects of sexually oriented businesses on certain nearby property and on children who live, shop, or play in the vicinity, and which constitutes only an incidental restriction of

San Antonio, Texas Ordinance 87443 -
Passed and approved 2/26/98; Effective date 3/10/98

First Amendment freedoms only to the degree essential to the furtherance of a public interest; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Code of the City of San Antonio, Texas, Chapter 35, entitled "Unified Development Code", Section 35-1041, is hereby amended by adding the following definitions:

Sexually Oriented Business includes any of the land uses defined as follows:

(l) "Adult Arcade" means any place to which the public is permitted or invited, wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are designed and maintained to show images to five or fewer persons per machine or device at any one time, and where the images so displayed are distinguished or characterized by the depiction or description of specified sexual activities or specified anatomical areas.

(2) "Adult Bookstore" means an Adult Bookstore, Adult Novelty Store, or Adult Video Store where more than 20% of its inventory (that is offered for sale, rental or viewing for any form of consideration to on-premises customers) or floor space consists of one or more of the following:

(a) books, magazines, or sound recordings, or printed, visual or audio material of any kind which are characterized by their emphasis on the description or depiction of specified anatomical areas or specified sexual activities; or

(b) non-contraceptive instruments, devices, toys, or paraphernalia designed for use in connection with specified sexual activities, books, magazines, pamphlets, pictures, drawings, photographs, motion picture films, or sound recordings, or printed, visual or audio material of any kind, which, because of the depiction or description of specified sexual activities in the materials offered for sale, is restricted to adults. Novelty designed as sight gags, advertised as such and not designed or advertised for sexual activity, are not instruments or devices as defined and regulated herein.

(3) "Adult Entertainment Establishment" means a nightclub, bar, restaurant "bottle club", "men's club", "gentlemen's club", "cabaret" or similar place of business, or portion thereof where live entertainment is provided for patrons, whether or not alcoholic beverages are served which features as a significant portion of the entertainment an emphasis on the exhibition, depiction, or description of specified anatomical areas or specified sexual activities; or a place where entertainment is provided to patrons wherein, because of the nudity or semi-nudity of person(s) employed by or associated with the operation of the business, admittance is limited to adults, or admittance is advertised or promoted as being restricted to adults.

(4) "Adult Motel" means a motel, hotel or similar commercial establishment which: (a) offers public accommodations, in any form of consideration, which provides patrons with closed-circuit television transmission, films, motion pictures, video cassettes, slides, or other photography reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas, and (b) which advertises the availability of this sexually oriented type of material by means of a sign visible from the public right-of-way, or by means of any off-premises advertising, including, but not limited to, newspapers, magazines, pamphlets, leaflets, radio, or television.

(5) "Adult Motion Picture Theater" means a business place where one or more films, videos, slides, motion pictures, or similar photographic reproductions are shown that have as a dominant theme, or are distinguished by, an emphasis on the depiction or description of specified sexual activities for observation by patrons or guests, and where admittance to such showings are restricted to adults.

(6) "Adult Theater" means a theater, concert hall, auditorium, or similar commercial establishment which, for any form of consideration, regularly features employees, volunteer patrons, or independent contractors, who appear nude or semi-nude and/or engage in specified sexual activity, or live performances which are characterized by exposure of specified anatomical areas or engagement in specified sexual activities.

(7) "Massage Parlor" means any place where, for any form of consideration or gratuity, massage, alcohol rub, administration of fomentation, electric or magnetic treatments, or any other treatment or manipulation of the human body which occurs as a part of, or in connection with, such treatment, manipulation, or service related thereto, exposes specified anatomical areas. The definition of a massage parlors shall not include the practice of massage in any licensed hospital, nor by a licensed massage therapist, hospital, licensed physicians, surgeons, chiropractor, osteopath, nurse, technician working under the supervision of a licensed physician, surgeon, chiropractor, or osteopath, nor by trainers of any amateur, semiprofessional or professional athlete or athletic team or school athletic program.

(8) "Sexual Encounter Establishment" means any business or commercial establishment that, as one of its primary business purposes, offers for any form of consideration, a place where two or more persons may congregate, associate, or consort for the purpose of specified sexual activities or the exposure of specified anatomical areas when one or more of the persons is in a state of nudity or semi-nudity. The definition of sexual encounter establishment shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or medical professional, licensed by the state engages in medically approved and recognized therapy or treatment.

(9) "Nude Modeling Studio" means any place where a person who, for money or any form of consideration, appears in a state of nudity or displays specified anatomical areas, to

be observed, sketched, drawn, painted, sculptured, photographed, or otherwise depicted by other persons. This definition shall not include nude modeling by an adult that occurs in conjunction with art classes of a university, college, or any art class supervised by an art instructor paid by an arts school.

(10) "Nudity Attraction Establishment" means any place of business where nudity or semi-nudity is regularly or routinely advertised as a characteristic of the business or which regularly attracts patrons with nudity or semi-nudity.

Additional definitions are as follows:

(11) "Specified Anatomical Areas" means the human genitals, crevice of the buttocks, pubic region, anus, and the areola of the post puberty female breast.

(12) "Specified Sexual Activity" means actual and simulated human genitals in a state of sexual stimulation or arousal, actual or simulated human masturbation, sexual intercourse, sodomy, fellatio, cunnilingus, fondling or other erotic touching of human genitals, pubic region, buttock or female breast, and excretory functions as part of or in connection with the above described activity.

(13) "Nude" or "Nudity" or "State of nudity" means a state of dress which fails to cover the human anus, genitals, pubic region, and the areola of the post puberty female breast.

(14) "Semi-nude" or "Semi-nudity" or "State of Semi-nudity" means a state of dress which fails to fully opaquely cover the crevice of the human buttocks, genitals, pubic region, and the post puberty female breast areola.

(15) "Negative Secondary Effects" means any one of the following conditions caused by geographic proximity to a Sexually Oriented Business:

(1) depreciation in surrounding property values; and/or

(2) violations of law not limited to but including: Indecent Exposure, Drug Use, Prostitution, Pandering, Exposing Minors to Harmful Materials, Possession and Distribution of Obscene Materials, Possession and Distribution of Controlled Substances, Public Intoxication, Disturbing the Peace, and/or

(3) adverse impact upon the City of San Antonio's central business district as a family oriented vacation destination.

SECTION 2. The City Code of the City of San Antonio, Chapter 35, entitled "Unified Development Code, ARTICLE III, entitled "ZONING", Sec. 35-3305, entitled "Adult entertainment restrictions", is amended to read as follows:

Sec. 35-3305. Sexually Oriented Business Regulations.

These regulations shall apply to all Sexually Oriented Businesses operating on or after the effective date of this

ordinance. Existing Sexually Oriented Businesses shall refer to this Section and to Nonconforming Use regulations (located in Unified Development Code Article III Division 4 Sec. 35-3061 et. seq. of this Code) to determine their appropriate classification.

(a) Property Uses Requiring Separation.

Not withstanding any provision of this Code to the contrary, it shall be a violation to use or occupy land or a building for the purpose of operating or maintaining a Sexually Oriented Business within one thousand (1000) feet from property (referenced within this Section as "protected property," "protected use" or "protected zone") that is described as follows:

1) another Sexually Oriented Business;

2) any property zoned for or devoted to A, B, C, D, Temporary A, Temporary R-1, R-A, R-1, R-2, R-2A, R-3, R-4, R-5, R-6, R-7, R-8 residential use, including any land zoned for one of the aforementioned residential uses which is also described as a Planned Unit Development but excluding airports;

3) any property devoted to church, synagogue, mosque, or other religious worship facility used primarily for religious worship;

4) any public or private elementary, secondary or high school; or

5) any public park.

(b) Method of Measurement & Survey Requirements.

(1) Measurements shall be in a straight line, without regard to intervening structures or objects, from the nearest property line of the lot on which the Sexually Oriented Business is located, to the nearest property line of the protected properties described in the above subsection (a), which requires separation. This method of measurement shall apply to a Sexually Oriented Business which is the sole tenant, within one building, located on one platted lot.

2) Measurements shall be in a straight line, without regard to intervening structures or objects, from the nearest point of the occupied space of the Sexually Oriented Business to the nearest property line of the protected property described in the above subsection (a) which requires separation. This method of measurement shall apply to a Sexually Oriented Business which is a tenant within a multiple tenant building.

(3) In calculating the distances described in subsection (b)(l) and (b)(2) immediately above easements (such as right-of-way, drainage and utility easements) that are zoned as, or abut, a protected property classification, shall not be considered as part of the protected property.

(4) A certified survey prepared by a licensed surveyor or licensed engineer showing distance measurements in accordance with (1) and (2) of this subsection shall be submitted to the Director of Building Inspections for all Sexually Oriented Businesses as part of the application for the Certificate of Occupancy. Any Certificate of Occupancy issued for a building or facility used to conduct a Sexually Oriented Business without submission of the required survey shall be null and void.

(c) Central Business District Prohibition.

In addition to the location restrictions of subsection (a), it shall be a violation to operate, own, manage, or maintain a Sexually Oriented Business within the Central Business District described as follows:

Beginning at the intersection of Salado and El Paso Streets; north on Salado to its intersection with Frio Street; thence northeast in a straight line to the intersection of IH-10 and Cadwallader; south on IH-10 to IH-35; northeast on IH-35 to a perpendicular point of connection with Cherry Street; south on Cherry Street to Durango Boulevard; west on Durango to the San Antonio River; south along the San Antonio River to Arsenal Street; west on Arsenal to El Paso Street; and then west on El Paso to Salado, the place of beginning (see map).

d) Nonconforming Rights

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Commentary: Type A nonconforming use rights extend to those establishments granted such rights pursuant to the methodology established by Ordinance 82135, passed and approved April 27, 1995, and this Ordinance and are subject to Section 35-3065 of this Code except for amortization at the direction of City Council. Type B nonconforming use rights extend to all other establishments that were lawfully in operation either prior to the adoption of this section or outside of the City's corporate limits; but, as a result of the adoption of this section, or annexation after the adoption of this section, continued operation of the establishment is unlawful. A conforming use is one that is operating in a lawful manner consistent with the provisions of this section.

(l) Establishment of Nonconforming Use Rights for Sexually Oriented Businesses.

Each sexually oriented business hereafter subject to this section through annexation must, within 90 days of such annexation, apply for one of two classes of property use rights hereby established, as part of the application for a new certificate of occupancy:

A) Type B Nonconforming Use Rights of one year duration from the date of issue of the Certificate of Occupancy.

B) Conforming.

(1) The 90 day time period prescribed within this subsection for the establishment of use rights may

be extended, and an application accepted after the expiration of 90 days, if the Director of Building Inspections determines that the use existed prior to the date of annexation, the sexually oriented business was operating in compliance with all applicable laws, and the failure to timely file the application for one of two classes of property use was not a result of gross negligence or conscious indifference. The Director shall render his decision within thirty (30) business days of receipt of the application and shall transmit said determination to the applicant by certified mail, return receipt requested. The applicant may appeal an adverse determination by filing a written notice of appeal with the City Clerk within 10 days of the date of the decision of the Director. The appeal must be filed by the authorized agent of the applicant. The City Clerk shall place said appeal on the City Council agenda within 60 days from the date notice is received.

(2) Any business that holds a certificate of occupancy issued for a sexually oriented business pursuant to the provisions of Ordinance 82135 of April 27, 1995 is not required to re-apply, and all such certificates of occupancy are hereby confirmed. Provided however, that any Type B Certificate of Occupancy that has or would expire prior to the enactment of this ordinance is hereby extended to expire at 12 o'clock midnight on March 10, 1999.

(3) Measurements to determine if a Sexually Oriented Business is conforming or Type B Nonconforming Use shall be in the manner prescribed in this Section.

(e) Amortization of Type B Nonconforming Use Rights Beyond One Year

(1) Amortization Hearing Before the Zoning Board of Adjustment.

The owner of a Sexually Oriented Business that has been granted Type B Nonconforming Use Rights by the Director of Building Inspections may request a hearing before the Board of Adjustment for a determination of a reasonable amortization period based upon the owner's investment and other generally accepted amortization factors in accordance with the appropriate provisions of Sec. 35-3065 of this Code.

(2) The application for the hearing shall be made upon a form provided by the Department of Building Inspections and must be filed by the owner of the Sexually Oriented Business with the Zoning Board of Adjustment on or before the date the Type B Nonconforming Use Rights would otherwise expire.

(3) The filing of an amortization request shall continue the Type B Nonconforming Use Rights of a Sexually Oriented Business to the date established

by the Board of Adjustment, who shall hear and determine the request after affording all interested parties an opportunity to be heard.

(4) If the Board of Adjustment finds a reasonable amortization period is less than one year, the period of nonconforming use rights may nevertheless continue for a minimum period of one year from the date the Type B Nonconforming Use Certificate of Occupancy is issued.

(5) A person aggrieved by the finding of the Board of Adjustment may petition the District Court for review as provided by Texas law.

(f) Additional Regulations Governing all sexually oriented businesses:

(1) *Type B Nonconforming rights* shall not be lost by the subsequent establishment of a protected use or protected zone within 1000 feet.

(2) *Type A Nonconforming rights pre-dating protected use within 1000 feet.* Any sexually Oriented business legally operating on and after April 27, 1995, which is rendered nonconforming by the subsequent location of a protected use or a protected zone within the protected distance, shall have Type A Nonconforming Use Rights.

(3) Any Sexually Oriented Business annexed by the City after the effective date of this ordinance shall be subject to all the requirements of this section.

(4) The Director of Building Inspections shall either issue or deny a certificate of occupancy to a sexually oriented business not more than thirty (30) business days subsequent to the date of the applicant's submission of an application therefor. If granted, the applicant shall be notified of such action by certified mail, return receipt requested. If denied, the applicant shall be notified of such action and the reason(s) therefore by certified mail, return receipt requested.

(5) The issuance of a certificate of occupancy shall not be withheld if the sexually oriented business is determined to be in compliance with all applicable sections of this Code.

(6) An applicant may appeal a denial by the Director of Building Inspections, if the reason for the denial is other than one based upon location of the business. Such appeals shall be made to the appropriate board or commission (i.e. plumbing board, electrical board, etc.) and in the manner prescribed in the applicable section of this Code. In the event that the Code does not provide a specific avenue for appeal an applicant may appeal to the Zoning Board of Adjustment by letter mailed or delivered to said Board, and the secretary of the Board shall schedule the appeal for hearing and decision at the next available regularly scheduled Zoning Board of Adjustment meeting which

will allow compliance with the Texas Open Meetings Act. The Board, after a hearing at which all interested parties shall be afforded an opportunity to be heard, shall either affirm or overrule the decision of the Director of Building Inspections. Provided, however, the request for appeal must be made not more than ten (10) business days subsequent to the receipt of the decision of the Director of Building Inspections by the applicant.

(7) Notwithstanding the provisions of Subsection (f)(6), immediately above, an applicant who is denied the certificate of occupancy requested under the provisions of this ordinance, may petition to any lawfully established court having jurisdiction of the subject matter, without first appealing to any board including the Zoning Board of Adjustment.

(g) Certificate of Occupancy requirements for sexually oriented businesses:

(1) If the subject building or portion of the building is intended for future use or is currently used as a "sexually oriented business", then the following shall be submitted attached to and made part of the application for Certificate of Occupancy:

A) a certified survey map prepared by a state licensed surveyor or state licensed engineer which shows the required minimum distances from properties with protected uses or protected zoning; and

B) a sworn affidavit stating the name and mailing address of all owner(s) of the planned, or existing, sexually oriented business; and

C) if a corporate owner, the current name and street address of the corporate president and the registered agent for service on file with the Texas Secretary of State.

(2) It shall be a violation of this ordinance for an owner of a sexually oriented business to fail or refuse to submit the prerequisite certified survey map or to fail or refuse to register the names and addresses of the owner(s). Without both the certified survey map and owner identification, no valid Certificate of Occupancy can be issued. Upon discovery of the absence of or the incorrectness of either document, the Certificate of Occupancy shall be declared invalid by the Director of Building Inspections.

(3) A "Sexually Oriented Business Certificate of Occupancy Fee" of $575.00 shall be paid to the City of San Antonio with the submission of each application for a Certificate of Occupancy for a sexually oriented business to pay for the cost of review and verification of accuracy of the application, survey maps, ownership information, and conformance with other certificate requirements.

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(h) Violations Subject to Criminal and Civil Penalties.

(1) Any natural person or corporate entity who violates any provision of this section shall be guilty of a Class C misdemeanor offense, and upon conviction thereof, shall be punished by a fine not to exceed $2,000.00.

(2) In addition to the criminal sanctions authorized by the subsection, the City Attorney is authorized to bring a civil action in law or equity against any party who violates any provision of this section. The City Attorney may bring a civil action against a party without first seeking criminal sanctions.

SECTION 3. The Nonconforming Use Determination Board established by Ordinance 82135, passed and approved April 27, 1995, is hereby authorized to continue its duties for 90 days after the effective date of this ordinance. Thereafter, said Board shall be disempowered. Said Board shall consist of the Chief of Police, the Director of Planning, and the Director of Asset Management, or duly authorized representatives, who shall hear evidence and determine all written requests for Type A Nonconforming Use Rights as follows:

1. Properties which are already devoted to Sexually Oriented Businesses as of the effective date of this ordinance shall have the option to apply for Nonconforming Use Rights. The Nonconforming Use Determination Board will grant Type A Nonconforming Use Rights for a Sexually Oriented Business if the Board finds that (1) the Sexually Oriented Business is more than one thousand (1000)

feet from any single family residence, church, synagogue, mosque, or other religious worship facility used primarily for religious worship, any public or private elementary, secondary or high school, public park, another Sexually Oriented Business, and not within the Central Business District as herein defined, or (2) is separated from single family residences, churches, synagogues, mosques, or other religious facilities used primarily for religious worship, any public or private elementary, secondary or high schools, public parks, and other sexually oriented businesses by less than 1,000 feet but such uses are separated from the sexually oriented business by an active railroad right-of-way, multi-laned interstate highway or similar significant barrier that acts as a barricade buffering such uses.

As well as establishing conformance with either (1) or (2) of this subsection, the Board shall determine whether or not, in part because of the establishment by the applicant of the facts noted in either (1) or (2) above, that the sexually oriented business is not causing negative secondary effects to any of the uses noted in 35-3305 (a) of this ordinance.

In the event that two or more sexually oriented businesses that apply for Type A nonconforming rights are found to be unable to qualify solely because the presence of such sexually oriented business makes it impossible for any one of such businesses to meet the qualifications of (1) or (2) of this subsection; then, in such event, the Board may grant Type A

nonconforming rights to the business that establishes in fact that it is the older such business in the area created by the application of the qualifications established in (1) or (2) above.

2. Any business may appeal the decision of the Nonconforming Use Determination Board to the City Council by filing a written notice of appeal with the City Clerk within 10 days of the decision of said Board. The appeal must be filed by the authorized agent of the appellant. City Council shall hear said appeal within 60 days from the date notice is received by the City Clerk.

SECTION 4. Ordinance 65513, passed and approved on August 13, 1987, adopting the Unified Development Code, including the current zoning regulation of adult entertainment, is hereby amended by, as written in, the above SECTIONS 1 and 2 of this ordinance.

SECTION 5. City Code section 35-3004, entitled "Certificate Occupancy" is hereby amended by deleting the existing subsections (d), (e) and(f) and adding new subsection (d) as follows:

(d) If the subject building or portion of the building is intended for future use or is currently used as a "sexually oriented business," then the application for a certificate of occupancy shall also comply with Section 35-3305(g) of the Code.

SECTION 6. Ordinance 82135, passed and approved on April 27, 1995, is amended and re-enacted as provided herein.

SECTION 7. Should any Article, Section, Part, Paragraph, Sentence, Phrase, Clause, or Word of this ordinance, or any appendix thereof, for any reason, be held illegal, inoperative, or invalid, or if any exception to or limitation upon any general provision herein contained be held to be unconstitutional or invalid or ineffective, the remainder shall, nevertheless, stand effective and valid as if it had been enacted and ordained without the portion held to be unconstitutional or invalid or ineffective.

SECTION 8. It is officially found, determined, and declared that the meeting at which this ordinance is adopted was open to the public and public notice of the time, place, and subject matter of the public businesses to be considered at such meeting, including this ordinance, was given, all as required by Texas Revised Civil Statutes Annotated as amended Title 5, Chapter 551, Government Code. It is further found that provision of this ordinance are intended to protect the public health, safety and welfare, and, that a public hearing was held prior to the adoption of this ordinance as required by V.T.C.A., Local Government Code Section 211.006.

SECTION 9. The City Clerk is directed to publish notice of this ordinance in accordance with the City Charter.

SECTION 10. The publishers of the City Code and the Unified Development Code are authorized to amend said Codes to reflect the changes adopted herein.

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Passed and approved 2/26/98; Effective date 3/10/98

SECTION 11. This ordinance shall be effective March 10, 1998.

PASSED AND APPROVED on this the 26th day of February, 1998.

/s/ _____
Mayor
Howard W. Peak

Attest: /s/ _____
Assistant City Clerk

Approved as to Form: _____
City Attorney

APPENDIX E

UNITED STATES CONSTITUTION
FIRST AMENDMENT

Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

No. 03-0163

Supreme Court, U.S.
FILED
OCT 2 - 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CITY OF SAN ANTONIO,

Petitioner,

v.

ENCORE VIDEOS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR M. SCHWARTZ,
Counsel of Record
MICHAEL W. GROSS
SCHWARTZ & GOLDBERG, P.C.
1225 Seventeenth Street,
Suite 1600
Denver, Colorado 80202
(303) 893-2500

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Fifth Circuit err in determining that the City's content correlated sexually oriented business zoning ordinance violated the First and Fourteenth Amendments to the United States Constitution for failing to narrowly regulate only those businesses shown to cause adverse external secondary effects where there was no evidence in the legislative record that businesses such as Respondent's that did not offer on-premises viewing of sexually explicit films caused the adverse secondary effects sought to be mitigated by the ordinance?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondent Encore Videos, Inc. is a Texas corporation. None of its shares are held by a publicly traded company and there are no parent companies.

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STATEMENT OF THE CASE

The City has filed a Petition for Writ of Certiorari on the issue of whether the Fifth Circuit erred in declaring the San Antonio sexually oriented business zoning ordinance unconstitutional as applied to businesses that do not offer on-premises viewing of films in the absence of any evidence in the legislative record concerning adverse secondary effects caused by these type of businesses.

Respondent Encore Video, Inc. operates a retail video store located at 1031 N.E. Loop 410 in the City of San Antonio, Texas. Respondent's video store sells video cassettes, DVD's, and magazines for off-premises consumption only. No live entertainment or films are exhibited on the premises.

On April 27, 1995, the San Antonio City Council enacted Ordinance No. 82135, which regulated the locations available for the operation of sexually oriented businesses within the city limits. App. 65a. Ordinance No. 82135 provided, *inter alia*, that sexually oriented businesses were prohibited from operating within 1,000 feet of places of worship, schools, public parks, and the Central Business District. Respondent's store is located within 1000 feet of residential property, separated by Loop 410.

The City refused to issue Respondent a certificate of occupancy on the basis that it failed to meet the distance requirements under the ordinance. Under the threat of closure, Respondent filed a complaint against the City seeking declaratory and injunctive relief alleging that Ordinance No. 82135 was unconstitutional on its face and as applied.

In response, the City amended and re-enacted the ordinance as Ordinance No. 87443 in an effort to remedy certain constitutional deficiencies. The new ordinance went into effect on March 10, 1998.

Among the amendments contained in Ordinance 87443 was a clarification in the definition of "Adult Bookstore." App. P. 70a. Because the language of this definition is crucial to the determination of the issues in this case it will be quoted in full here:

> "Adult Bookstore" means an Adult Bookstore, Adult Novelty Store, or Adult Video Store where more than 20% of its inventory (that is offered for sale, rental or viewing for any form of consideration to on-premises customers) or floor space consists of one or more of the following:
>
> (a) books, magazines, or sound recordings or printed, visual or audio material of any kind which are characterized by their emphasis on the description or depiction of specified anatomical area or specified sexual activities; or
>
> (b) non-contraceptive instruments, toys, or paraphernalia designed for use in connection with specified sexual activities, books, magazines, pamphlets, pictures, drawings, photographs, motion picture films, or sound recordings, or printed visual or audio material of any kind, which, because of the depiction or description of specified sexual activities in the materials offered for sale, is restricted to adults. Novelty designed as sight gags, advertised as such and not designed or advertised for sexual activity, are not instruments or devices as defined and regulated herein.

The parties filed cross motions for summary judgment. The District Court upheld Ordinance 87443 in an amended order, dated October 2, 2000. App. 20a-62a. The District Court held that Ordinance No. 87443 did not vest unbridled discretion in the licensor for failing to provide specified time limits for the numerous mandated inspections prior to the issuance of a certificate of occupancy. Pet. App. 26a-32a. The Court further determined that the City had a reasonable belief that the Ordinance would address negative secondary effects attributable to sexually oriented businesses.

On appeal, the Fifth Circuit reversed the District Court order with regard to the zoning restriction. *Encore Videos, Inc. v. City of San Antonio,* 310 F.3d 812 (5th Cir. 2002). The City filed a petition for rehearing en banc. The petition for rehearing was denied, but the Fifth Circuit issued a new opinion superseding the original opinion, that altered the analysis but not the result. *Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288 (5th Cir. 2003). After examining the studies contained in the legislative record, the Fifth Circuit once again struck down the zoning restriction on the basis that, given "the extensive reach of the ordinance, we must require at least some substantial evidence of the secondary effects of establishments that sell adult products solely for off-site consumption. Otherwise, even ordinary bookstores and video stores with adult sections could be subjected to First Amendment rights without evidence that they cause secondary effects." 330 F.3d, at 295. Because the City failed to produce any evidence of adverse secondary effects specific to businesses that sell books or videos solely for off-site entertainment,

the Fifth Circuit found the zoning restriction to be unconstitutional. *Id.*

REASONS THE PETITION SHOULD BE DENIED

I. THE FIFTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS DECIDED PRIOR TO THIS COURT'S DECISION IN *CITY OF LOS ANGELES V. ALAMEDA BOOKS, INC.*, 535 U.S. 425 (2002)

The City asserts that the Fifth Circuit decision in the instant case is in conflict with the decisions of the Eighth, Tenth, and Sixth Circuits in the cases of *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418, (8th Cir. 1994); *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998); and *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998). However, an examination of these cases, decided prior to this Court's recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), indicates these cases need to be re-examined in light of that decision. As such, there does not exist a clear split in the circuits because this Court's recent decision in *Alameda Books* modified the analysis of evidence required to support a content correlated time, place and manner regulation of adult businesses.

This Court, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), upheld an adult zoning ordinance regulating theaters providing adult films "for observation by patrons therein" as being consistent with the First Amendment subject to certain limitations. When the government imposes restrictions on protected speech it

bears the burden of justifying the restriction. "In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, [the courts] cannot assume the harm exists or that the regulation addresses it." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 135 L.Ed.2d 888, 917 (1996).

In order to impose zoning restrictions on adult businesses, the ordinance must serve a substantial government interest and allow for reasonable alternative avenues of communication. *Renton* expressly recognized that such an ordinance should be "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects thus avoiding the flaw that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975)." *City of Renton*, 475 U.S. 41, at 52.

This Court's decision in *Alameda Books Inc.*, 535 U.S. 425, clarified the procedure and level of proof for justification of the type of ordinance upheld in *Renton*. While Justice O'Connor's plurality opinion in *Alameda Books* relied upon *Renton* for the principle that a municipality may rely upon relevant evidence to demonstrate a connection between speech and a substantial independent government interest, it indicated that the government need prove more than just some rational relationship between the regulation and the government interest. The plurality opinion stated, "This is not to say a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.*, at 438.

> First, what proposition does a city need to advance in order to sustain a secondary effects ordinance? Second, how much evidence is required to support the proposition?

Alameda Books, id., at 449. (Kennedy, J. concurring in the result). *Alameda Books* provided clarification of these issues that calls into question the decisions in the cases the City asserts are in conflict with the Fifth Circuit decision in the instant case.

The cases the City claims are in conflict with the instant case were decided without the benefit of *Alameda Books*. As recognized by the Fifth Circuit in its opinion, neither the decision in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), nor *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), engaged in any meaningful analysis of the evidence advanced to support the zoning ordinances. In both cases, the courts deferred to the judgment of the local legislative bodies without any critical examination of the record for flawed reasoning or shoddy data.

Recently, a federal district court in Minnesota in *DiMa Corporation v. High Forest Township*, 2003 WL 21909571 (D. Minn. Aug. 7, 2003), acknowledged that the Eighth Circuit decision in *ILQ* did not conclusively preclude examination of the legislative record concerning the secondary effects of a business that did not provide on-premises viewing of adult material under the *Alameda Books* decision. While the district court did not address the issue of whether *Alameda Books* overruled *ILQ*, the court determined that "under the standard set forth in *Alameda Books*, the Court finds that genuine issues of fact exist as to whether High Forest Township was reasonable in

relying upon the studies that provided the rationale for the ordinance." *Id.*, at * 4.

In *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d at 687, the Tenth Circuit did not give any weight to the evidence relied upon by the district court that contradicted the justification for the ordinance. As stated by Untied States District Court Judge Richard Matsch in ruling on cross-motions for summary judgment, "[t]he problem here is that none of the material relied on by the city council shows that the business of Christie's bears any relationship to such [secondary] effects. Indeed, in the matter of any increase in crime, the evidence is distinctly to the contrary." *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 932 F.Supp. 1256, 1258 (D. Colo. 1996). Thus, in light of the rejection of "shoddy reasoning or data" to support content correlated zoning ordinances in *Alameda Books*, the result in the Tenth Circuit in *Z.J. Gifts* might well be different today.

The other case claimed by the City to create a circuit conflict, *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998), was not mentioned by the Fifth Circuit in its opinion because it did not deal in any shape or form with the issue presented in this case. In *Richland*, an adult video store (defined as principal or predominant amount of stock-in-trade as adult material) that did not have on-premises viewing, unsuccessfully challenged a limitation on hours of operation and a restriction on private viewing arcades. The City erroneously contends there is a conflict between the instant case and *Richland Bookmart* when the legal issues are not related in any significant way.

Contrary to the assertions of the City, there is no clear conflict between the Fifth Circuit's decision in this case and the aforementioned decisions in the Sixth, Eighth, and Tenth Circuits. All of those decisions were decided prior to this Court's decision in *Alameda Books*. To the extent there may be some inconsistencies in the results of these cases, these inconsistencies are capable of being resolved by the lower courts as demonstrated in *DiMa Corp. v. High Forest Township*. If recurring problems concerning the application of *Alameda Books* arise, then that issue will be determined by this Court at that time. However, at the present time this is not a concrete problem that needs to be resolved by this Court.

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN *CITY OF RENTON V. PLAYTIME THEATRES, INC.*, 475 U.S. 41 (1986) AND *CITY OF LOS ANGELES V. ALAMEDA BOOKS, INC.*, 535 U.S. 425 (2002)

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 52 (1986) upheld an adult zoning ordinance on the basis it was "narrowly tailored to affect only that category of theatres shown to produce the unwanted secondary effects . . ." The San Antonio ordinance struck down in this case is *not* narrowly tailored to affect *only* the category of businesses *shown* to produce the unwanted secondary effects. There is no evidence to show that video stores that sell only materials for off-premises consumption and carry only 20% of their stock in adult materials cause negative external effects on the community. Further, the ordinance is so broad as to restrict businesses that have not been shown to cause these adverse external effects.

Under the express language of *Renton*, the San Antonio ordinance fails to meet the narrow tailoring requirement. The decision in *Alameda Books* only adds support to this position. As stated by Justice Kennedy in his opinion concurring in the result, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. . . . A city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Alameda Books*, 535 U.S., at 122 S.Ct., at 449. Justice Kennedy concluded that the ordinance could survive summary judgment because the city could claim the "ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished and that total secondary effects will be significantly reduced." *Id.*

The effect of the San Antonio ordinance is far different. The quantity of speech will be reduced since mainstream book and video stores will be required to monitor and adjust their inventory to limit adult themed features to less than 20% of their inventory or floor space. Ordinance 87443, Section 1 (2), Pet. App. 70a. There is no indication that such an onerous restriction will serve to reduce any secondary effects because there is no evidence to suggest that these types of businesses even have any external secondary effects any different from any neighborhood video store that may carry 10-15% adult titles.

The San Antonio ordinance challenged in the instant case applies to businesses that offer 20% of their stock or floor space as adult materials, not a "principal business purpose," as in the ordinance struck down in *FW/PBS,*

Inc. v. City of Dallas, 493 U.S. 215, 253-254, n.5 (1990) (Scalia, J. dissenting). See also *Renton*, 475 U.S., at 44 (defining adult theaters as "an enclosed building used for presenting [adult films] for observation by patrons therein.") Under the definitions in the Renton and Dallas ordinances, "the quantity of speech will be substantially undiminished and . . . total secondary effects will be significantly reduced." *Alameda Books*, 535 U.S., at 449 (Kennedy, J. concurring in the result).

In contrast, the Fifth Circuit found, under the San Antonio ordinance, "even ordinary bookstores and video stores with adult sections could be subjected to regulation that restrict their First Amendment rights without evidence that they cause 'secondary effects.'" *Encore Videos, Inc.*, 330 F.3d at 295. The impact of the San Antonio ordinance is substantial and may seriously impact this type of mainstream retail business.

Contrary to the City of San Antonio's assertion that the panel opinion was in conflict with this Court's decisions, the opinion in this case applied the proper standard in light of *Alameda Books*. After reviewing the three studies relied upon by the City to justify the ordinance, the panel correctly determined that these studies failed to account for a completely different type of business than that considered in the studies. "Given the expansive reach of the ordinance in the instant case, we must require at least some substantial evidence of secondary effects of establishments that sell adult products solely for off-site consumption." *Id.*, 330 F.3d at 295. The panel concluded, "the city was required to provide at least some substantial evidence of secondary effects specific to adult businesses, that sell books or videos solely for off-site entertainment."

Id. The City wholly failed to present any such evidence to support this broad regulation.

Under Justice Kennedy's concurring opinion, any regulation of speech to control the adverse external effects of a business must leave the quantity of speech "substantially undiminished." This is consistent with the requirement of *Ward v. Rock Against Racism*, 491 U.S. 781, at 799 (1989), that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

Alameda Books did, in fact, impose substantive requirements on municipalities to justify regulations that have the effect of limiting expression. In the instant case, there is no evidence in the record relating to the adverse effects of retail businesses that have 20% of their stock-in-trade materials for off-premises viewing. There is no live entertainment or viewing of sexually explicit films on the premises. In the absence of any evidence pertaining to video stores, a municipality cannot simply broadly regulate categories of businesses not shown to produce the unwanted external effects of adult businesses.

Thus, the Fifth Circuit correctly relied upon the *Renton* and *Alameda Books* opinion, as well as other Supreme Court cases concerning the narrow tailoring standard applicable to time, place, and manner regulations. The Fifth Circuit decision in this case faithfully applies the decisions of this Court and protects the rights guaranteed to all citizens by the First and Fourteenth Amendments to the United States Constitution. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: October 2, 2003.

Respectfully submitted,

ARTHUR M. SCHWARTZ #557
MICHAEL W. GROSS #14113
SCHWARTZ & GOLDBERG, P.C.
1225 Seventeenth Street, Suite 160
Denver, Colorado 80202
(303) 893-2500

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IN THE
Supreme Court of the United States

THE CITY OF SAN ANTONIO,

Petitioner,

v.

ENCORE VIDEOS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

SCOTT D. BERGTHOLD
LAW OFFICE OF
SCOTT D. BERGTHOLD, PLLC
6830 MCCUTCHEON ROAD
CHATTANOOGA, TN 37421
(423) 899-3025

MICHAEL P. HODGE
DEPUTY CITY ATTORNEY
Counsel of Record
DONALD S. BAYNE
ASST. CITY ATTORNEY
P.O. BOX 839966
SAN ANTONIO, TX 78283
(210) 207-8766

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ARGUMENT IN REPLY

Respondent's brief in opposition to the petition offers two arguments for denying the petition. The first argument, however, simply demonstrates that the circuits are split on the question presented. Respondent's second argument – based on a factual assumption made by the appeals court – demonstrates that this Court should grant certiorari to clarify that such assumptions do not invalidate reasonable zoning standards for sexually explicit businesses.

I. The Split in the Circuits is Clear.

This Court has repeatedly held that in enacting zoning regulations for sexually oriented businesses, cities may rely upon any evidence "reasonably believed to be relevant" to the goal of preventing secondary effects. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion); *see also id.* at 451 (Kennedy, J., concurring in judgment); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

The Sixth, Eighth, and Tenth Circuits have relied on this standard to uphold zoning ordinances as applied to sexually oriented book and video stores that do not have "peep-show" booths on the premises. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998). In contrast, the Fifth Circuit invalidated San Antonio's zoning ordinance for an alleged failure to produce secondary effects evidence specific to "establishments that sell adult products solely for off-site consumption." Pet. App. 13a.

Encore purports to argue that no conflict exists, but then proceeds to identify the conflict and contends that "these cases need to be reevaluated in light of" *Alameda Books*. Respondent's Brief in Opposition at 2. Moreover, the Fifth Circuit noted the conflict between its position and that of the Eighth and Tenth Circuits. Pet. App. 13a (following *World Wide Video, Inc. v. Tukwila*, 816 P.2d 18, 21 (Wash. 1991) and rejecting *ILQ* and *Z.J. Gifts*).

In enacting its zoning ordinance, the City of San Antonio relied upon much of the same evidence that was found sufficient for Rochester, Minnesota and Aurora, Colorado in *ILQ* and *Z.J. Gifts*, respectively. For example, the legislative record of all three ordinances included, *inter alia*, the Indianapolis, Indiana study conducted in 1984. *See ILQ*, 25 F.3d at 1418; *Z.J. Gifts*, 136 F.3d at 687 n.1; Pet. App. 66a. That study:

> included a national survey of real estate appraisers. Of the 507 responding appraisers, 80% opined that an adult bookstore would reduce the value of residential properties within one block of the site, and 72% opined that an adult bookstore would reduce the value of commercial properties within one block.

ILQ, 25 F.3d at 1418.

The *ILQ* decision, upon which the City also relied in defending its ordinance, described the adverse impacts of adult businesses, including an adult bookstore, found in a St. Paul, Minnesota study:

> The documented secondary effects included "discarded pornographic literature allegedly found in the streets,

> sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and ... becomes available to minors even though its sale to minors is prohibited."

Id.

Both the Eighth Circuit and the Tenth Circuit found that this kind of information was "reasonably believed to be relevant" to the problems that Rochester and Aurora sought to avoid by requiring adult bookstores – even those without peep-show booths for "on-premises" viewing of videos – to remain minimum distances from residences. Simply put, nothing in the legislative evidence suggested that the depressive effect of adult bookstores on nearby property values or the problem of pornographic litter turned on the sub-category of adult bookstore at issue. Rather, the *ILQ* and *Z.J. Gifts* courts permitted the municipalities to make the logical inference that such effects flow from the presence of a *pornographic bookstore* in the neighborhood, regardless of whether the enterprise has booths or mini-theaters for displaying its sexually explicit fare.

Not so in the Fifth Circuit. The "heightened specificity" requirement applied to San Antonio's legislative record by the panel below is clearly at odds with the version of the *Renton* standard applied by the Eighth and Tenth Circuits. Additionally, it is contrary to the *Renton* standard as applied by certain district courts after *Alameda Books*. *See, e.g., World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143, 1155 (E.D. Wash. 2002) (upholding zoning ordinance against "retail-only" adult bookstore's challenge, and finding that *Alameda Books* is consistent with both *Z.J. Gifts* and *ILQ Investments*); *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County*, 256 F.Supp.2d 385, 395 (D. Md. 2003) (following *ILQ* and upholding ordinance as applied to adult bookstore without peep-show booths).

Despite Respondent's protestations to the contrary, the conflict in the circuits over the question presented is apparent, and this Court should accept certiorari to resolve the conflict.

II. The Lower Court Misconstrued the Scope of the Ordinance and Relied Upon False Assumptions About Its Application.

Encore seizes upon the unsupported assumption made by the lower court that "even ordinary bookstores and video stores with adult sections could be subjected to regulation...." Pet. App. 13a; Respondent's Brief in Opposition at 10.

There is absolutely no evidence in the record, however, to support the assumption that San Antonio's ordinance will affect mainstream bookstores. This is because no evidence suggests that any "ordinary" bookstore in San Antonio has "*more than 20%* of its inventory" in materials "*characterized by their emphasis on* ... specified anatomical areas or specified sexual activities" or in "non-contraceptive instruments, devices, toys, or paraphernalia designed for use in connection with specified sexual activities...." Ordinance 87443, Pet. App. 70a-71a.

The City, following *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 54 n.4 (1976), defined "specified anatomical areas" to include "the human genitals, crevice of the buttocks, pubic region, anus, and the areola of the post-puberty female breast." Pet. App. 74a. Similarly, the ordinance narrowly defines "specified sexual activity" as:

> [A]ctual or simulated human genitals in a state of sexual stimulation or arousal, actual or simulated human masturbation, sexual intercourse, sodomy, fellatio, cunnilingus, fondling or other erotic touching of human genitals, pubic region, buttock or female breast, and excretory functions as part of or in connection with the above described activity.

Ordinance 87443, Pet. App. 74a.

For inventory to count under the ordinance, it is not sufficient that the item contain a picture with incidental nudity, full frontal nudity, or an ultimate sex act. Rather, the magazine or movie must be *characterized by an emphasis upon* such depictions.

In construing a similar adult bookstore definition in the Dallas ordinance, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 255 n. 5 (1990) (Scalia, J., concurring in part and dissenting in part), Justice Scalia noted that the ordinance "would be interpreted to apply only to businesses that not only (1) offer live nudity or hard-core sexual material, (2) as a constant and intentional objective of their business, but also (3) seek to promote it as such." *Id.* at 261.

Encore attempts to distinguish the San Antonio definition from the Dallas definition on the grounds that the Dallas definition did not use a percentage of inventory, but rather defined an adult bookstore as a commercial establishment that has "as one of its principal business purposes" the sale of materials "which depict or describe 'specified sexual activities' or 'specified anatomical areas.'" *Id.* at 254 n. 5; *see* Respondent's Brief in Opposition at 9-10. This purported distinction is unpersuasive.

First, a business that has "more than 20% of its inventory" in hard-core sexual materials can hardly claim that the sale of such materials is not "one of its principal business purposes." Second, the San Antonio ordinance is arguably more narrow than the Dallas ordinance, since that ordinance covered materials "which depict or describe" specified anatomical areas and specified sexual activities, whereas the San Antonio ordinance counts, toward the adult use classification, only materials *characterized by an emphasis upon* displays of those

areas and activities. *ILQ*, 25 F.3d at 1419 ("The limiting term, 'characterized by an emphasis' on the sexually explicit, which ILQ characterizes as overly broad, has been widely construed since it was discussed and upheld in the Supreme Court's 1976 decision in American Mini Theatres").

Thus, there is no meaningful distinction between the instant ordinance and Dallas ordinance. Neither encompasses mainstream bookstores. Again, neither Encore nor the court below pointed to any record evidence supporting its assumption that "ordinary" bookstores – such as Barnes & Noble or Waldenbooks – have greater than 20% of their inventory in sex toys or materials *characterized by an emphasis upon* graphic nudity and sex acts. No such evidence exists.

Encore asserts that "the quantity of speech will be reduced," Respondent's Brief in Opposition at 9, but fails to give one example, in the years since the ordinance's passage, of how a mainstream bookstore has been targeted or speech has been reduced.

Moreover, Encore – which formerly operated in a valid location – does not deny that a properly zoned adult bookstore can have 100% of its inventory in sexually graphic material, and that the ordinance provides adequate sites for adult businesses. Pet. App. 49a.

Instead, Encore argues that the ordinance is unconstitutional due to its potential impact on *other* businesses not before the Court. In rejecting a similar challenge to an adult business zoning ordinance, the Texas Court of Appeals held that:

> In the absence of evidence that the main-line chain bookstores in question had at least 20% of their "stock and trade" devoted to sexually oriented material ... or that they were dealing in sexually related instruments, devices, or paraphernalia, the appellants have failed to

show that those stores fell within the application of the ordinance.

Malloy v. City of Lewisville, 848 S.W.2d 380, 383 (Ct. App. Tex. 1993).

Likewise, Encore has failed to show "from the text of [the law] and from actual fact," *Virginia v. Hicks*, 123 S. Ct. 2191, 2198 (2003), that *any* impermissible applications of the ordinance have been advanced by the City.

III. The Lower Court Misapplied Narrow Tailoring Analysis in Contravention of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

Given the secondary effects evidence upon which the City relied, the narrow scope of the San Antonio ordinance, and the lack of evidence to support Respondent's assumption, it is clear that the decision below misapplied the narrow tailoring prong of the time, place, and manner test.

Under that test, a regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). Provided that the regulation is not "substantially broader than necessary,"an ordinance "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1999).

Narrow tailoring "does not turn on a judge's agreement" with the legislative body "'concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Id.* (quoting *Albertini*, *supra* at 689).

These principles are well-established in the Court's adult business zoning cases. *Renton* held that "[the] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 475 U.S. at 52 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion). In *Alameda Books*, the Court reiterated *Renton's* deferential "reasonably believe to be relevant" standard for legislative evidence and emphasized that "courts should not be in the business of second-guessing" the factual determinations of city planners. *Id.* at 451 (Kennedy, J., concurring in judgment).

In this case, the City's ordinance does not sweep substantially broader than necessary to serve its substantial interest in protecting residences from the adverse effects of adult bookstores. As detailed above, *supra* pp. 2-4, these effects range from adverse impacts on property resale values to the problem of pornographic litter. *See World Wide Video of Washington, Inc. v. Spokane Arcade*, 227 F.Supp.2d 1143, 1158-59 (E.D. Wash. 2002). The City contends that these problems are linked to the presence of an adult bookstore, regardless of whether the store has peep show booths. This inference is reasonable, and the lower court erred in rejecting it. *Alameda Books*, 535 U.S. at 452 (Kennedy, J., concurring in judgment).

Although the court below disagreed with the City's planners "concerning the most appropriate method for promoting significant government interests," the record offers no support for its assumption that the City's adult business ordinance targets mainstream establishments.

Nor does narrow tailoring analysis permit invalidation of the ordinance simply because the lower court would have set a higher percentage of sexually graphic inventory for defining an

adult use or would have implemented a less restrictive measure of addressing secondary effects. In essence, the lower court imposed an empirical proof requirement – which was rejected in *Alameda Books*, 535 U.S. at 439 (plurality) – and then substituted its own assumption for the predictive judgment of the City's land use planners. In doing so, the court created a circuit conflict and contravened both *Renton* and *Alameda Books*. Accordingly, this Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL P. HODGE
DEPUTY CITY ATTORNEY
Counsel of Record
DONALD S. BAYNE
ASSISTANT CITY ATTORNEY
P.O. BOX 839966
SAN ANTONIO, TX 78283
(210) 207-8766

SCOTT D. BERGTHOLD
LAW OFFICE OF
SCOTT D. BERGTHOLD, P.L.L.C.
6830 MCCUTCHEON ROAD
CHATTANOOGA, TN 37421
(423) 899-3025